Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

October Term, 1994

Alaska Fish and Wildlife Federation and Outdoor Council, Inc., Alaska Fish and Wildlife Conservation Fund, Inc., Rodney M. Arno, Mary L. Bishop, Richard H. Bishop, Margaret M. Burley, Richard A. Burley, Gary W. Feaster, Albert W. Franzmann, Marcus F. Jensen, Susan L. Kisken, William D. Kisken, and Robert H. Parkerson,

Petitioners

v.

State of Alaska

Respondent

v.

Bruce Babbitt, Secretary of the Interior, Dan Glickman, Secretary of Agriculture, and the Federal Subsistence Board

Respondents

MOTION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Where the newly-elected Governor of Alaska withdrew an appeal challenging federal authority to promulgate regulations governing the day-to-day management of fishing, hunting and otherwise obtaining wildfoods, can individuals who subsist on wildfoods intervene in this Court, under *Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (1967), to challenge the federal regulations that will cut off their access to wildfoods?

(2) Where Congress considered but failed to delegate to the Secretary of the Interior authority over the day-to-day management of fishing, hunting and otherwise obtaining wildfoods in Alaska, does the Secretary have "fill-the-gap" authority to regulate subsistence wildfoods gathering after Alaska's subsistence wildfoods management law was declared unconstitutional?

(3) Where Petitioners, representing affected individuals, appear to have the right to intervene under Fed. R. Civ. P. 24(a) to protect their access to wildfoods, was the Ninth Circuit correct in denying, *without any explanation*, Petitioners' Motion to Intervene to continue the interlocutory appeal requested by the District Court?

Certificate Required by Rules 14.1 & 29.1

The Alaska Legislature was an unsuccessful movant below, but is not listed in the caption. The 45 organizational members of the Alaska Outdoor Council are listed in Appendix C, Pp. 73a-74a.

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Petitioners, Alaska Fish and Wildlife Federation and Outdoor Council, Inc., *et al.*, pray for leave to intervene and further pray that a writ of certiorari be granted to review the judgments of the United States Court of Appeals for the Ninth Circuit in *Alaska v. Babbitt*, entered on February 7, 1995, February 23, 1995, and April 20, 1995.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit denying Petitioners' Motion to Intervene is printed at Appendix A hereto, P. 3a, *infra*, and is not reported. The decision of the United States Court of Appeals for the Ninth Circuit dismissing the issue of the Secretary of Interior's[1] authority to promulgate the regulations at issue in this case is printed at Appendix A hereto, P. 7a, *infra*, and is not reported. The decision of the United States District Court for the District of Alaska determining, *inter alia*, that the Secretary has the authority to promulgate the regulations at issue in this case is printed at Appendix A hereto, P. 23a, *infra*, and is not published; it is reported at 1994 WL 487830 (D. Alaska). The decision of the Ninth Circuit on the continuation of the appeal, adopting the District Court's holding on the Secretary's authority, is printed at Appendix A hereto, P. 11a, *infra*; that decision was issued on April 20, 1995, and is to be reported at __ F.3d __ (9th Cir. 1995).

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1 For purposes of this case, the Secretary of the Interior has jurisdiction over all lands except National Forests. 16 U.S.C. § 3102(12). The Secretary of Agriculture has identical jurisdiction over National Forests. *Id.* For brevity herein, both Secretaries will be referred to in the singular as "the Secretary."

JURISDICTION

The judgment of the Ninth Circuit denying Petitioners' Motion to Intervene was entered on February 23, 1995; a timely-filed Petition for Reconsideration was denied on March 22, 1995. The underlying judgment of the Ninth Circuit dismissing the issue of the Secretary's authority was entered on February 7, 1995, and amended on February 10, 1995; a timely-filed Petition for Reconsideration by the Alaska Legislature was denied on March 7, 1995. The judgment of the Ninth Circuit on the continued appeal was issued on April 20, 1995.

This Court has jurisdiction under 28 U.S.C. § 1254(1) over both the Ninth Circuit's order denying intervention, *United Auto Workers v. Scofield*, 382 U.S. 205, 209-10 (1965)(denial of intervention is immediately appealable), and the order dismissing the challenge to the Secretary's authority. *Usner v. Luckenbach Overseas Corp., et al.*, 400 U.S. 494, 495-96 (1971)(review of interlocutory order which had been converted into final order of dismissal); *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251 (1972).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3100, *et seq.*, and especially Section 102 of ANILCA, 16 U.S.C. § 3202, which reads:

16 U.S.C. § 3202. Taking of fish and wildlife

(a) Responsibility and authority of State of Alaska

Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for

management of fish and wildlife on the public lands except as may be provided in subchapter II of this chapter, or to amend the Alaska Constitution.

(b) Responsibility and authority of Secretary

Except as specifically provided otherwise by this act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.

(c) Areas controlled; areas closed, exceptions

The taking of fish and wildlife in all conservation system units, and in national conservation areas, national recreation areas, and national forests, shall be carried out in accordance with the provisions of this Act and other applicable State and Federal law. Those areas designated as national parks or national park system monuments in the State shall be closed to the taking of fish and wildlife, except that --

(1) not withstanding any other provision of this Act, the Secretary shall administer those units of the National Park System, and those additions to existing units, established by this Act and which permit subsistence uses, to provide an opportunity for the continuance of such uses by local rural residents; and

(2) fishing shall be permitted by the Secretary in accordance with the provisions of this Act and other applicable State and Federal law.

STATEMENT OF THE CASE

This case asks who has the authority for the day-to-day management of hunting, fishing, trapping and otherwise gathering of natural wildfoods in Alaska. Petitioners Alaska Outdoor Council, representing Alaskans who rely on natural wildfoods for subsistence, contend that Congress explicitly rejected management by the Secretary. The District Court found that Congress "unintentionally and inadvertently" omitted the authority for the Secretary to regulate, and that the Secretary has "fill-the-gap" authority under general delegation of powers.

After the November 1994 elections, the new Governor filed a stipulation to withdraw the State's appeal of the District Court's finding. Both the Alaska Legislature and Petitioners Alaska Outdoor Council unsuccessfully attempted to intervene to continue the appeal. The Ninth Circuit then assumed the Secretary's authority in deciding the rest of the appeal.

The Petitioners have a long history of influence on Alaska's wildfoods policies. The Alaska Fish and Wildlife Federation and Outdoor Council, Inc. ("AOC"), is an Alaska non-profit corporation, exempt from federal taxation under IRC § 501(c)(4). AOC is a state-wide umbrella organization of approximately 45 member organizations representing approximately 12,000 members; 1,200 persons have joined as individual members of AOC. AOC's purposes include: protection and perpetuation of renewable natural resources, equality in access to and use of these resources; support of professional resource management; and, education, promotion, and participation in regulatory, legislative, judicial and public policy processes affecting these resources.

AOC has long been recognized by courts for its protection of natural resources. *See, e.g., Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle* ("*AOC v. Dunkle*"), 829 F.2d 933, 937-38 (9th Cir. 1987), *cert. denied, sub nom., Alaska Federation of Natives, et al. v. Alaska Fish and Wildlife Federation and Outdoor Council, Inc.*, 485 U.S. 988 (1988)(AOC's interest in protection of migratory birds gives standing to stop Federal government from permitting illegal out-of-season hunting); *discussed* in *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1395-97 (9th Cir. 1992)(AOC's standing to challenge federal actions based on "aesthetic and environmental well-being").

The Alaska Fish and Wildlife Conservation Fund, Inc. ("Conservation Fund") is an Alaska non-profit charitable and educational organization, exempt from federal taxation under IRC § 501(c)(3). The Conservation Fund is made up of approximately 1,200 individual members (who are also members of AOC). The Conservation Fund's purposes include: providing information on fish and wildlife resources, their conservation and related activities; educating the public regarding the American hunting, trapping and fishing heritage; and litigating to protect natural resource rights enshrined in the Alaska Constitution.

As shown by the summary affidavit[2] of individual petitioner Richard Bishop, attached as Appendix B, *infra*, ("Bishop Aff."), the individual petitioners, Rodney M. Arno, Mary L. Bishop, Richard H. Bishop, Margaret M. Burley, Richard A. Burley, Gary W. Feaster, Albert W. Franzmann, D.V.M., Marcus F. Jensen, Susan L. Kisken,

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2 Petitioner Bishop's affidavit, summarizing affidavits submitted below, is filed to meet any requirements for intervention in this Court.

William D. Kisken, Robert H. Parkerson, are long-time residents of Alaska and subsistence hunters, fishers and natural wildfoods gatherers. App. B, P. 67a. All the individual petitioners, for example, currently and historically depend on hunting, trapping and fishing for their predominant or entire supply of meat and fish. Bishop Aff., App. B, P. 68a, ¶ 3.

The individual petitioners have provided sworn affidavits that they believe that the federal regulation at issue in this litigation will prevent them from enjoying the physical, financial, social, cultural and aesthetic benefits of subsistence hunting and fishing guaranteed them by the Alaska Constitution. Bishop Aff., App. B, P. 68a, ¶ 4. The individual petitioners believe, for example, that:

> their health is directly tied to their ability to obtain nutritious, low-fat wildfoods, free of artificial additives and hormones, Bishop Aff., App. B, P. 68a, ¶ 5;
>
> their subsistence hunting and fishing directly affects their social and cultural values, *Id.*; and,
>
> the federal wildlife management regulations at issue in this litigation will prevent them from continuing activities in which they have engaged for decades and in which they would otherwise engage immediately. *Id.*

Much of the individual movants' hunting and fishing is in areas which are now or will be under Federal control under the Secretary's management: the Kenai Peninsula, White Mountains National Recreation Area, Arctic National Wildlife Refuge, Yukon Flats National Wildlife Refuge, Denali National Preserve, and the Tanana River. Bishop Aff., App. B, P. 69a, ¶ 6.

Petitioner Bishop, for example, regularly fishes in the Tanana River; the Tanana River will come under Federal control. *Id.* He expects that his fishing access will be withdrawn. *Id.* His access to traditional moose hunting areas had been cut off in the past. *Id.*

The individual movants regularly use these areas to gather wildfoods, and, absent federal regulations which will stop them, intend to do so in the immediate future. Bishop Aff., App. B, Pp. 68a-69a, ¶ 5.

Since their incorporations, AOC and the Conservation Fund (hereafter both organizations and the individual plaintiffs collectively will be referred to in the singular as "AOC") have been involved in six state and federal lawsuits involving federal and state fish and wildlife management policies. *See, e.g., AOC v. Dunkle*, 829 F.2d at 934-38; *McDowell, et al. v. United States*, *vacated* and *remanded*, 32 F.3d 572 (9th Cir. 1994); *Alaska v. United States*, 662 F. Supp. 455 (D.C. Alaska, 1987), *aff'd*, *Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989); *cert. denied*, 495 U.S. 919 (1990); *McDowell v. Alaska*, 785 P.2d 1 (Alaska, 1989).

The 1989 *McDowell* Alaska Supreme Court decision, *id.*, which held that the Alaska Constitution forbids the reservation of natural wildfoods, is critical to the Secretary's position in this lawsuit. "As a result of [*McDowell*], the Department of Interior . . . [was] required to assume responsibility for the implementation of title VIII of ANILCA [16 U.S.C. §§ 3100, *et seq.*] on Federal public lands on July 1, 1990." Preamble to Federal Subsistence Regulations, 56 FED. REG. 64404 (Dec. 9, 1991).

The Secretary created a Federal board to adopt regulations for the day-to-day management of subsistence hunt-

ing and fishing. 57 FED. REG. 22940 (May 29, 1992). The Secretary designated as "public lands," subject to the federal subsistence priority management efforts, all federally-owned lands and all non-navigable waters located on these lands. 57 FED. REG. 22951 (May 29, 1992) These include the lands historically and currently used by AOC. Bishop Aff., App. B, P. 69a, ¶ 6.

The State of Alaska sued the Secretary in 1992, arguing that the Secretary's management regulations were *ultra vires* under both the plain text and legislative history of ANILCA. *Alaska v. Babbitt*, No. 92-264-CV (D. Alaska).

This case was consolidated with a suit alleging that Congress intended the rural subsistence priority to apply to all navigable waters in Alaska. *John v. United States*, __ F.3d __, printed in App. A, P. 11a.

On March 30, 1994, the District Court granted summary judgment in favor of the Federal government, holding that the Secretary **was** authorized to regulate subsistence hunting and fishing on public lands. App. A, P. 39a. The District Court acknowledged that Congress did not expressly delegate the authority, but found the omission "unintentional[] and inadvertent[]." App. A, P. 36a. The District Court found that the Secretary was empowered to "fill the statutory gap" left by Congress's "unintentional[] and inadvertent[]" lapse. *Id.*

At the same time, however, the District Court invited the parties to take an interlocutory appeal under the Interlocutory Appeals Act. 28 U.S.C. § 1292(b).[3] In its March

3 The Interlocutory Appeals Act permits an appeal of an order where the District Judge is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

30 Order, the District Court said:

> If the Court's decision . . . is not correct, any further action that this Court might take in implementing Title VIII of ANILCA would be fundamentally and irreparably flawed. It would be a tremendous, tragic waste of time and money of Federal regulators if the Courts were to mistakenly require that they assume responsibility for the management of fish for subsistence purposes in the navigable waters of the State of Alaska.

Order, March 30, 1994, at 3.

The Alaska Attorney General filed a Petition for an interlocutory appeal on April 14, 1994. On May 19, 1994, the Ninth Circuit granted permission to appeal under 28 U.S.C. § 1292(b). The parties briefed the issues, and five states joined Alaska as *amici curiae.* The *amici* states were Arizona, California, Idaho, Montana and Oregon.

Then, on January 23, 1995, the Governor of Alaska announced in a speech **to the AOC** that he would direct the dismissal of the appeal of the District Court's Order finding authority for the Secretary to administer and manage fish and wildlife on the public lands. David Hulen, *State Drops Subsistence Suit vs. Feds,* Anchorage Daily News, Jan. 24, 1995, at A-1.

On January 26, 1995, the Alaska Legislature passed a Resolution stating that, if the dismissal proceeded, the Legislature would attempt to intervene. S. Con. Res. 6, 19th Leg., 1st Sess., 1995 Alaska Sess. Law. Nevertheless, a Stipulation of Dismissal was signed by the State and filed with the Ninth Circuit.

On January 27, 1995, the Legislature's Motion for Substitution or to Intervene was filed as an emergency order under Ninth Circuit Rule 27.3. On February 7, 1995, one day before oral argument was scheduled, the Ninth

Circuit denied the Legislature's Motion to Intervene. App. A, P. 9a.

The February 7 Order dismissed the issue of the Secretary's authority from the case. App. A, P. 10a.

With both the Governor and the Legislature out of the case, AOC was left without a representative. AOC filed a Fed. R. App. P. 12(b) letter on Monday, February 13. After consent to intervene was refused by other parties, AOC moved to intervene on February 15, 1995.

The Ninth Circuit denied AOC's Motion to Intervene on February 23, 1995. App. A, P. 3a. The Order denying intervention was one sentence long, without explanation. App. A, P. 4a. No other decision or explanation of the denial of intervention was issued.

A timely-filed Petition for Rehearing was denied on March 22, 1995. App. A, P. 1a.

On April 20, 1995, the Ninth Circuit issued its opinion in the continuing appeal of the consolidated case. *John v. United States.* App. A, P. 11a. The Ninth Circuit declared that:"We hold also that the federal agencies **that administer the subsistence priority** are responsible for identifying those [navigable] waters." App. A, P. 19a (emphasis added).

The Ninth Circuit dismissed the issue of the Secretary's authority in a footnote:

> [a]nother issue originally raised in this appeal was whether Title VIII of ANILCA authorizes the federal government to manage subsistence fishing and hunting on public lands in the absence of Alaska laws implementing the subsistence priority. The district court held that ANILCA does, in fact, authorize the appropriate federal agencies to promulgate regulations if the state does not or cannot do so. After briefing was completed in this court, but before oral argument, the parties, in-

> cluding the state of Alaska, stipulated to the dismissal with prejudice of that issue. We accepted the stipulation. . . . In light of the dismissal with prejudice of that issue, the district court's holding on this issue stands.
>
> App. A, P. 21a, n. 2.

Thus, left without any representation in an appeal which says that the Secretary has the authority to promulgate regulations which cut off AOC and its members from a substantial part of their food supply, Petitioners AOC come before this Court seeking both intervention to review the Ninth Circuit's acceptance of the District Court's summary judgment and the denial of their Motion to Intervene.[4]

REASONS FOR GRANTING INTERVENTION AND THE PETITION FOR A WRIT OF CERTIORARI

The Court should grant Petitioner's request for intervention because AOC meets all requirements for intervention in this Court. If intervention is granted, the Court should review and reverse the Ninth Circuit's and District

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4 Although the usual rule is that a litigant denied intervention below may only petition for review of the denial of intervention, *United Auto Workers v. Scofield*, 382 U.S. 205, 209 (1965), after consultation with the Clerk, Petitioners suggest that review of both the underlying decision of the Ninth Circuit and of the denial of intervention is appropriate. Petitioners are attempting to carry forward a constitutional and statutory challenge which directly affects them, yet which has been abandoned by their government representatives. Similar procedures were utilized in *Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (1967)(petition to intervene granted, petition for certiorari granted), and in *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969)(petition for intervention granted). *See*, Stern, Gressman, Shapiro and Geller, SUPREME COURT PRACTICE 315 (7th Ed., 1993).

Court's finding that the Secretary has the authority under ANILCA to promulgate the subsistence management regulations; there is no authority under the text or history of ANILCA to support the Secretary's regulations.

In the alternative, if intervention is not granted, the Court should review and reverse the Ninth Circuit's unexplained denial of Petitioner's motion to intervene, and remand for further proceedings.

1) AOC Should Be Permitted to Intervene In This Court To Challenge The Secretary's Authority.

A) Intervention After Judgment to Take An Appeal Is Recognized As An Important Right.

In this case, AOC is attempting to intervene, after judgment, in order to take an appeal. As shown below, AOC is fully qualified for this procedure.

Intervention after judgment for the purpose of appealing a case is an unusual course, but one which is traditionally permitted to qualified applicants. *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 395-96 (1977)("Our conclusion is consistent with several decisions of the federal courts permitting post-judgment intervention for the purpose of appeal."); *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986)(intervenor who satisfies Article III standing requirement may continue appeal); *Immigration and Naturalization Service v. Chadha*, 454 U.S. 812 (1981) and 462 U.S. 919, 930 & n. 5 (1983)(*amici* below granted intervention to continue suit); *United States v. LTV Corp.*, 746 F.2d 51, 54 (D.C. Cir. 1984); *Shults v. Champion Int'l Corp.*, 35 F.3d 1056, 1058 (6th Cir. 1994); *Didrickson v. U.S. Dept. of Interior*, 982 F.2d 1332, 1337-39 (9th Cir.

1992); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991).

B) This Court Permits Intervention After Judgment To Petition For Certiorari.

The ordinary rule is that movants for intervention who were unsuccessful below can challenge only the denial of intervention. *United Auto Workers v. Scofield*, 382 U.S. at 209. There are, however, exceptions, where "the Court has allowed a nonparty below, whose rights were vitally affected by the lower court's decision, to intervene, by motion in the Supreme Court, in order to file the nonparty's own petition for certiorari where those interests, which were defended by the losing party below, had been abandoned by the losing party's failure to apply for certiorari." Stern, Gressman, Shapiro and Geller, SUPREME COURT PRACTICE 315 (7th Ed., 1993). That is the case here.

AOC – the real party in interest – is attempting to carry forward a constitutional and statutory challenge which directly affects it and its members, yet which has been abandoned by its government representatives. Similar procedures were utilized in *Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (1967)(petition to intervene granted; petition for certiorari granted) and 390 U.S. 459 (1968), and in *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969)(petition to intervene granted). The same procedure is appropriate here.

C) AOC Should Be Able To Intervene After Judgment to File This Petition.

Ordinarily, Fed. R. Civ. P. 24(a) sets forth four criteria for intervention.[5] When no other party wishes to con-

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5 Although the Federal Rules of Civil Procedure apply in District

tinue an appeal, however, an intervenor must demonstrate particularized injury distinct from other citizens – in other words, Article III standing. *Diamond v. Charles,* 476 U.S. at 62, 68-69. AOC meets all these criteria for intervention.

i) AOC Has Standing:

As its declarations show, AOC is affected by the Secretary's actions, and by the District Court's decision in this case. AOC, and its constituent organizations and members, unlike the unsuccessful litigants in *Lujan v. Defenders of Wildlife, et al.*, __ U.S. __, 112 S.Ct. 2130, 2139-40 (1992), live in and utilize the areas affected by the Secretary's regulations. *AOC v. Dunkle*, 829 F.2d at 937-38.

Absent reversal of the District Court opinion, AOC members will not be able to hunt or fish for the wildfoods which make up the predominant portion of their low-fat, additive-free diets. If they attempt to do so despite the Federal prohibition, there is a credible risk of prosecution. *Diamond v. Charles*, 476 U.S. at 64 (conflict between officials and private parties subject to prosecution is a "classic case or controversy" under Article III); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)(no need to wait for prosecution before challenge). Removal of the regulations, however, will obviate any threat.

AOC could sue the Secretary to challenge the regulations directly. AOC thus has standing to continue this matter even after the original governmental parties have withdrawn. *Diamond v. Charles*, 476 U.S. at 77 (O'Connor, J., concurring).

Courts, "the policies underlying intervention may be applicable in appellate courts" as well. *United Auto Workers v. Scofield*, 382 U.S. at 216 & n. 10.

ii) AOC Meets the Criteria for Intervention:

Applications for intervention to take an appeal are determined under four criteria: timeliness; interest in the subject matter; practical impairment of the ability to protect the interest; and inadequate representation of the interest. Fed. R. Civ. P. 24(a).[6] AOC meets all four of these criteria:

a) Timeliness:

Intervention in a timely manner is the most critical requirement in post-judgment intervention. *United Airlines v. McDonald*, 432 U.S. at 395-96 ("The critical inquiry in every such case is whether, in view of all the circumstances, the intervenor acted promptly after the entry of final judgment."). Moving to intervene within the time required to notice an appeal is timely. *Id.* AOC is filing within the time permitted by Supreme Court Rule 13.1 (and AOC filed below within days of learning of its lack of representation in this case).

b) Interest:

AOC demonstrated standing by showing that the Secretary's regulations will cut off its access to food. By demonstrating standing, as shown above, AOC has also demonstrated a significantly protectable interest that is given

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6 To the extent that the Ninth Circuit's failure to explain its denial of intervention requires the Court to examine the grounds for both intervention of right and permissive intervention under Fed. R. Civ. P. 24(b)(2), *Diamond v. Charles*, 476 U.S. at 74 (O'Connor, J., concurring), AOC is also qualified for permissive intervention. AOC's claims have a common question of law and fact with this case. *Id.*, 476 U.S. at 76-77 (permissive intervention requires claims which can be raised in court).

some degree of legal protection. *Donaldson v. United States*, 400 U.S. 517, 531 (1971); *Diamond v. Charles*, 476 U.S. at 75 (O'Connor, J., concurring)("significantly protectable interest" means a direct and concrete interest which is accorded some degree of legal protection).

c) Practical Impairment:

AOC's interest would be significantly impaired if the Secretary is authorized to promulgate regulations which cut off AOC's access to food. Either State or Federal authorities will be bound by the unappealed District Court decision to enforce the cutoff. *H. L. v. Matheson*, 450 U.S. 398, 406 (1981)(State bound by unappealed ruling).

AOC need not wait until its food supply is actually cut off to show impairment; the District Court's unappealed ruling is enough. As the Ninth Circuit has noted: "Several courts have stated that *stare decisis* by itself may, in the proper case, furnish the practical disadvantage required for the petitioner to be entitled to intervention as of right." *Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977); *Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989).

d) Inadequate Representation:

"The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Legal Aid Society of Alameda County v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980), *quoting*, *Trbovich v. United Mine Workers*, 404 U.S. 528, 538-39 & n. 10 (1972).

The State's withdrawal from this case leaves AOC's interests in the subject matter open to impairment by the District Court's decision -- without any representation. "Because no representation constitutes inadequate representation," *Yniguez v. Arizona*, 939 F.2d 727, 737-38 (9th

Cir. 1991), where no party will continue the appeal, AOC's interests are not adequately represented in this case.

D) AOC's Intervention Will Serve Important Interests, Well-Recognized By This Court.

The normal course of judicial proceedings is to provide more, not less, review of facially-valid intervention requests. "[W]hen an order prevents a putative intervenor from becoming a party in *any* respect, the order is subject to immediate review." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987)(citation omitted); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 513 (1949)(order denying intervention to a person having an absolute right to intervene is final and appealable because "the lawsuit is all over so far as the intervenor is concerned.").

At this stage in the proceedings, AOC has no other option besides intervention in this Court. The Ninth Circuit has completed its review of the District Court's summary judgment. App. A, P. 20a. The issue is over as far as the District Court is concerned.

When a lower court ignores the requirement for serious consideration of intervention requests, this Court must exercise supervisory power. "On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary." Stern, Gressman, Shapiro and Geller, SUPREME COURT PRACTICE 191 (7th Ed., 1993). This Court should address such a "threat to the goal of uniformity of federal procedure posed by the decision below." *Hanna v. Plumer*, 380 U.S. 460, 463 (1965).

In addition to its right to intervene under this Court's decisions, AOC's intervention will serve important public interests. The overall interest served by AOC's intervention is that of justice to those who would be affected by

litigation in which they have no representative, as shown in *Banks* and *Hunter*.

There are other interests as well. For example, AOC seeks to defend important constitutional rights under the Fifth and Tenth Amendments, including rights of equal access to wildfoods on public lands. *United States v. Coleman*, 390 U.S. 599, 601 (1968)(certiorari granted because of "the importance of the decision to the utilization of the public lands"). In addition, AOC seeks to preserve its threshold procedural rights to present constitutional challenges to federal statutes which affect it. *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 470 (1982)(certiorari granted because of concern over interpretation affecting litigants' standing to bring constitutional challenge). And AOC seeks to preserve both judicial efficiency and the swiftest, least expensive method of vindicating its rights. Fed. R. Civ. P. 1; *United Auto Workers v. Scofield*, 382 U.S. at 212-13.

AOC should not be left without a remedy. AOC should be permitted to intervene to file a petition for certiorari not only for review of the denial of its Motion to Intervene below, but also for review of the issue of the Secretary's authority as well.

2) The Ninth Circuit's Decision That The Secretary Had Authority To Issue The Regulations Should Be Reversed Or Remanded.

A) The Secretary's Authority to Issue the Regulations Is Fundamental To This Case And Should Be Reviewed.

The issue of the Secretary's authority was before the Ninth Circuit under the Interlocutory Appeals Act. That Act permits an appeal of an order only where the District

Judge is "of the opinion that such order involves a **controlling question of law** as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b) (emphasis added).

This Court has reviewed interlocutory orders which had been converted to final orders of dismissal or summary judgment by courts of appeals. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971); *Hawaii v. Standard Oil Co. of Calif., et al.*, 405 U.S. 251 (1972).

The Ninth Circuit found that the Secretary had the authority to issue the regulations at issue. Indeed, the Ninth Circuit could not have held that "the federal agencies that administer the subsistence priority are responsible for identifying those [navigable] waters" if it had not assumed that the Secretary was, in fact, authorized to "**administer the subsistence priority**." App. A, P. 19a (emphasis added).

Whether characterized as "controlling" under the Interlocutory Appeals Act, or "fundamental" by the District Court, App. A, P. 31a, the issue of the Secretary's authority was determined solely by the Ninth Circuit's decision to dismiss the issue from the case without oral argument or decision. That is exactly the situation reviewed by this Court in *United Airlines v. McDonald*: a settlement by all the parties on an issue critical to the intervenors' rights. 432 U.S. at 389. A similar type of substantive review is appropriate here.

B) ANILCA Does Not Grant The Secretary Authority To Issue the Regulations, And the Court's Finding Should Be Reviewed.

i) The District Court's Analysis Was Neither Obvious Nor Correct, And Should Be Reviewed As An Important Matter of Federal Law:

The District Court said that its ANILCA analysis is "difficult to reconcile" with the express language of ANILCA.[7] App. A, P. 35a. The District Court sought interlocutory review[8] because it was beset by substantial doubts as to whether its summary judgment decision was correct. Order, March 30, 1994, at 3.

Nevertheless, because the Ninth Circuit dismissed the issue of the Secretary's authority from the case, no oral argument was held, and no explanation of the Ninth Circuit's adoption of the District Court's reasoning was given. App. A, P. 21a n. 2, 5 and 6. No further guidance was made available.

Such guidance is necessary because the District Court's analysis seems to ignore or misconstrue both the plain text and legislative history of ANILCA. For example, the District Court found that Congress never contemplated Alaska's state law not being in compliance with ANILCA. App. A, P. 36a (omission of authority to Secretary was inadvertent and unintentional). The Ninth Circuit echoed this finding when it said "Congress could not have anticipated" the same thing. App. A, P. 13a.

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7 Indeed, the District Court originally found that the Secretary had no authority. Order of November 19, 1993; Ninth Cir. Excerpts of Record at 49-50, 53.

8 By definition, an interlocutory appeal is only granted on a "controlling question of law **as to which there is substantial ground for difference of opinion**." 28 U.S.C. § 1292(b) (emphasis added).

Yet there is abundant evidence that Congress considered and rejected the possibility that the Secretary would take over wildfoods management when Alaska could not do so. In the Merchant Marine Committee's report in the 95th Congress, for example, the Committee explained that it restricted the Secretary's authority:

> [T]he Secretary would **not be authorized** to suspend the State's authority to manage subsistence resources or **to take over the management of those resources on the public lands**. Rather, the Secretary's discretion would be limited to closing the public lands . . .

H. Rep. No. 1045, Part II, 95th Cong., 2d Sess. 91 (1978) (emphasis added). The Committee noted that "only the State of Alaska, not the Federal Government, can hope to effectively manage the subsistence taking of the fish and wildlife resources in the State." *Id.*, at 76.

This was not an isolated Congressional finding. Thereafter, the Secretary's authority was steadily **reduced** until, as the District Court recognized, the Secretary was left without even the right to bring legal action to enforce the subsistence provisions. App. A, P. 59a-60a. The dissenters to the draft bill noted that the Secretary was powerless to manage and enforce the subsistence provisions. H. Rep. No. 97, Part I, 96th Cong., 1st Sess., 538-39 (1979)(Minority Views of Cong. Udall, *et al.*).

Similarly, the final Senate report, quoted by the District Court, indicates that the Secretary's responsibility under the subsistence provisions, where the State has failed to implement an appropriate program, is to "provide legal representation for such residents". App. A, P. 58a, *quoting*, S. Rep. No. 1300, 95th Cong., 2d Sess. 196-97 (1978). Even **that** authority for legal representation was removed by a floor amendment. App. A, P. 60a.

The final plain text of ANILCA states that, except as "specifically" stated, the Secretary's authority is not enlarged by the act. ANILCA § 1314(b), 16 U.S.C. § 3202(b). The legislative history again confirms that the Secretary's role was to remain the same as before, notwithstanding the new subsistence program. Under ANILCA, the Secretary's responsibility was to be for management of the habitat, not of the fish and wildlife.[9]

Since Congress did not intend to authorize the Secretary to enforce the subsistence provisions, and since the plain language of ANILCA says that the Secretary's authority is not enlarged (except as specifically noted in the Act), there does not appear to be any substantial rationale for the District Court's analysis (which was adopted by the Ninth Circuit).

Given the District Court's own doubts and the substantial evidence that the District Court's summary judgment was in error, the decision to dismiss this live important issue was an error. This Court should review the decision to dismiss this important issue as a matter of judicial management. S. Ct. R. 10.1(c).

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9 As the final Congressional report on ANILCA pointed out, management responsibilities were divided between the State and the Secretary. The State would manage "fish and wildlife," while the Secretary would manage "habitat:"

"Section 1314: Taking of Fish and Wildlife:

"This section, adopted as a Committee amendment, preserves the status quo with regard to the responsibility and authority of the State to manage fish and wildlife, and reconciles this authority with the Act, including the subsistence title. At the same time, the section confirms the status quo with regard to the authority of the Secretary to manage the wildlife habitat on Federal lands."

S. Rep. No. 413, 96th Cong., 1st Sess. 308 (1979).

ii) The Lack of Explicit Delegation of Authority to the Secretary Places The District Court's Analysis in Conflict With Decisions of This and Other Courts:

The Secretary's power is limited to that authorized by Congress. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Otherwise, the Secretary could abridge or enlarge the statute at will. *United States v. United Verde Copper Co.*, 196 U.S. 207, 215 (1905).

The District Court said that "No one contends that this is a case of explicit congressional delegation. Indeed, the State would seemingly not concede that there is any gap in this statute." App. A, P. 62a n. 29.

Any expansion of the Secretary's authority over matters traditionally managed by the State must be clearly expressed by Congress. *United States v. Lopez*, __ U.S. __, (No. 93-1260, April 20, 1995), Slip Op. 14-15 (Kennedy, J., concurring). Regulation of fish and game has traditionally been by the States and not by the Federal government. *Geer v. Connecticut*, 161 U.S. 519 (1896).

Nevertheless, the District Court utilized a deference test, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine how to resolve its doubts. Unfortunately, Congressional delegation of authority to an agency is a precondition to deference under *Chevron. Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 649 (1990).

The refusal to defer to an agency's interpretation of its own limits protects against the tendency for agencies to expand their authority. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 387 (1988)(Brennan, J., dissenting)("this Court has never deferred to an

agency's interpretation of a statute designed to confine the scope of its jurisdiction.")

The withholding of deference is especially important where Congress established the judiciary, instead of the agency, as the adjudicator of private rights. *Adams Fruit Co.*, 494 U.S. at 649-50. As even the District Court had to admit, in an "eleventh-hour revision to Section 807", Congress firmly removed the last vestige of the Secretary's authority to adjudicate rights under ANILCA, substituting a private right of action. App. A, 60a.

In addition, since a private right of action was created, deference was even less appropriate. *Kelley v. Environmental Protection Agency*, 15 F.3d 1100, 1108 (D.C. Cir. 1994).

The District Court's analysis, adopted by the Ninth Circuit, thus conflicts with numerous decisions of this and other Courts, and review is appropriate under S. Ct. R. 10.1(a) and (c).

iii) If Substantive Review Is Not Granted, The Issue of the Secretary's Authority Should Be Remanded to The Ninth Circuit For Further Proceedings:

As shown above, the District Court's, and by implication, the Ninth Circuit's findings on the Secretary's authority were fatally flawed. The Court should either summarily reverse those findings or grant certiorari on the substantive issue.

The Court, however, need not decide the ultimate issue of the Secretary's authority at this juncture. All the Court need do is reverse the Ninth Circuit's dismissal of the issue from the appeal and remand.

At least two willing and capable litigants stood ready to intervene to continue the appeal. App A, P. 3a (Denial

of AOC's Motion to Intervene), and 7a (Denial of Alaska Legislature's Motion to Substitute or Intervene).[10] The Ninth Circuit rejected both and dismissed the issue of the Secretary's authority from the case. *Id.* In so doing, the Ninth Circuit committed reversible error, and this Court should reverse the Ninth Circuit's dismissal of the issue of the Secretary's authority to promulgate the regulations.

3) In the Alternative, The Ninth Circuit's Denial of AOC's Motion to Intervene Should Be Reversed.

A) AOC Has The Right To Intervene Below.

As shown above, AOC had the right to intervene in the Ninth Circuit. The only criterion for standing or intervention which might vary from that discussed above (Pp. 11-14, *supra*), was timeliness of filing for intervention. AOC filed within a few days of learning that its interests would not be protected. Bishop Aff., App. B, P. 72a, ¶ 16.

B) Denying Intervention Without Explanation So Far Departs From the Accepted and Normal Course of Judicial Proceedings That It Should Be Reversed.

In this case, the Ninth Circuit's complete opinion denying intervention read:

"The Motion to Intervene by Alaska Outdoor Council, et al., has been considered and is DENIED."

App. A, P. 4a.

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10 If, as anticipated, the Alaska Legislature petitions the Court for a review of the denial of its Motion to Intervene, AOC strongly supports the Legislature's position.

Denying intervention without offering any reasons is an abuse of discretion. *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991). Given the very strong tradition of protecting the right to intervene, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983)("Rule 24 traditionally has received a liberal construction in favor of applications for intervention"), the Ninth Circuit's abuse of discretion is far beyond the normal course of judicial proceedings.

When a lower court ignores the requirement for serious consideration of intervention requests, this Court must exercise supervisory power. This Court should address such a "threat to the goal of uniformity of federal procedure posed by the decision below." *Hanna v. Plumer*, 380 U.S. at 463.

Because the Ninth Circuit abused its discretion under Fed. R. Civ. P. 24, review is appropriate under S. Ct. R. 10.1(a).

C) The Ninth Circuit's Unexplained Denial of Intervention Ignores Rulings of This and Other Courts:

As shown above, intervention after judgment for the purpose of appealing a case is rare, but well-recognized. *United Airlines v. McDonald*, 432 U.S. at 395-96.

Because the Ninth Circuit did not explain its denial of Petitioner's facially-valid Motion to Intervene, it is impossible to reconcile the Ninth Circuit's decision with those of this and other courts. The Ninth Circuit could not have based its decision on factual matters, because the appeal was of a summary judgment. The Ninth Circuit could not have relied on some other court's decision because no decision appears to deny Petitioner's eligibility to intervene.

Because the Ninth Circuit's unexplained denial of intervention is inconsistent with this Court's cases involving both intervention and intervention after judgment for the purpose of appealing a judgment, review of the denial of intervention is appropriate under S. Ct. R. 10.1(c).

Similarly, the Ninth Circuit's unexplained denial of intervention conflicts with decisions of other Courts of Appeal which have held that an unexplained denial of intervention is an abuse of discretion. *In re Sierra Club*, 945 F.2d at 780. Therefore review of the denial of intervention is appropriate under S. Ct. R. 10.1(a).

D) The Ability to Intervene Is An Important Federal Right That Must Be Protected.

As shown above, this and other Courts protect the rights of nonparties to intervene after judgment. *See, e.g., Banks,* 389 U.S. 813; *Hunter,* 396 U.S. 879; *United Airlines*, 432 U.S. 385. As the affidavits in this case demonstrate, the question for AOC and its members is whether they will be able to obtain wildfoods the way they have for decades. Bishop Aff., App. B, P. 69a, ¶ 7.

This Court has already considered a similar right valuable enough to warrant review. *United States v. Coleman*, 390 U.S. at 601 (review warranted because the case was important for the utilization of public lands). This right should be protected by permitting intervention.

In addition, this Court protects the right to intervene as a means to promote judicial economy and efficiency. *United Auto Workers v. Scofield*, 382 U.S. at 212-13. Judicial efficiency would be served by permitting this legal question to be pursued without requiring new litigation of an issue on which the District Court has already granted summary judgment.

Because the Ninth Circuit's unexplained denial of intervention affects these important federal rights, review of

the denial of intervention is appropriate under S. Ct. R. 10.1(c).

CONCLUSION

For the reasons stated, the Court should permit AOC to intervene and should reverse the decision of the Ninth Circuit on the issue of the Secretary's authority. In the alternative, the Court should reverse the Ninth Circuit's denial of AOC's Motion to Intervene.

Respectfully Submitted,

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May 8, 1995

No. _____

In The
Supreme Court Of The United States

October Term, 1994

Alaska Fish and Wildlife Federation and Outdoor Council, Inc., Alaska Fish and Wildlife Conservation Fund, Inc., Rodney M. Arno, Mary L. Bishop, Richard H. Bishop, Margaret M. Burley, Richard A. Burley, Gary W. Feaster, Albert W. Franzmann, Marcus F. Jensen, Susan L. Kisken, William D. Kisken, and Robert H. Parkerson,
Petitioners

v.

State of Alaska
Respondent

v.

Bruce Babbitt, Secretary of the Interior, Dan Glickman, Secretary of Agriculture, and the Federal Subsistence Board
Respondents

APPENDIX TO MOTION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BARNABY W. ZALL
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May 8, 1995

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ALASKA,

Plaintiff-Appellant,

v.

BRUCE BABBITT, Secretary of the Interior, et al.,

Defendants-Appellees

KATIE JOHN, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants

ORDER

Nos. 94-35480, 94-35481

D.C. Nos. CV-92-00264-HRH, CV-90-00484-HRH

Before: WRIGHT, HALL and WIGGINS, Circuit Judges.

Alaska Outdoor Council, et al., has filed with this court a motion for reconsideration or, in the alternative, petition for rehearing and suggestion for rehearing en banc.

The Motion for Reconsideration is DENIED. The Petition for Rehearing is DENIED. The Suggestion for Rehearing En Banc is REJECTED. Ninth Circuit General Order 6.11.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ALASKA,

Plaintiff-Appellant,

v.

BRUCE BABBITT,

Secretary of the Interior, et al.,

Defendants-Appellees

KATIE JOHN, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants

ORDER

Nos. 94-35480, 94-35481

D.C. Nos. CV-92-00264-HRH, CV-90-00484-HRH

Before: WRIGHT, HALL and WIGGINS, Circuit Judges.

The Motion to Intervene by Alaska Outdoor Council, et al., has been considered and is DENIED.

The Motion for Leave to File Brief Amici Curiae in Support of the Petition for Rehearing and Suggestion for Rehearing En Banc by Alaska Outdoor Council, et al., is GRANTED. The brief may be filed.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ALASKA,

Plaintiff-Appellant,

v.

BRUCE BABBITT,

Secretary of the Interior, et al.,

Defendants-Appellees

KATIE JOHN, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants

ORDER

Nos. 94-35480, 94-35481

D.C. Nos. CV-92-00264-HRH, CV-90-00484-HRH

Before: WRIGHT, HALL and WIGGINS, Circuit Judges.

Counsel for the Legislature of the State of Alaska have filed with this court a Petition for Rehearing with a Suggestion for Rehearing En Banc or, in the alternative, a Motion for Reconsideration of the court's order of February 7, 1995.

The Motion for Reconsideration is DENIED. The Petition for Rehearing is DENIED. The Suggestion for Rehearing En Banc is REJECTED. Ninth Circuit General Order 6.11.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ALASKA,

Plaintiff-Appellant,

v.

BRUCE BABBITT,

Secretary of the Interior, et al.,

Defendants-Appellees

KATIE JOHN, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants

AMENDED ORDER

Nos. 94-35480, 94-35481

D.C. Nos. CV-92-00264-HRH, CV-90-00484-HRH

Before: WRIGHT, HALL and WIGGINS, Circuit Judges.

The order filed February 7, 1995, is amended to read:

The Alaska State Legislature filed an emergency motion for leave to intervene or, in the alternative, for substitution or, in the alternative, for stay, as well as a memorandum in support of its motion. The Alaska State Attorney General and the United States filed letter briefs opposing the emergency motion. After considering the letter briefs and the authorities cited therein, we conclude the Alaska State Legislature is not empowered under state law to intervene in this appeal.

IT IS ORDERED that the Alaska State Legislature's alternative motions for intervention, substitution, and stay of the stipulated dismissal are DENIED.

IT IS FURTHER ORDERED that the issue covered by the stipulated dismissal, whether ANILCA authorizes the Secretary to manage the subsistence priority in the absence of consistent Alaska laws, is dismissed from the case and need not be addressed at oral argument.

FOR THE COURT

CATHY A. CATTERSON

CLERK OF COURT

By: _____

Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ALASKA,

Plaintiff-Appellant,

v.

BRUCE BABBITT,

Secretary of the Interior, et al.,

Defendants-Appellees

KATIE JOHN, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants

ORDER

Nos. 94-35480, 94-35481

D.C. Nos. CV-92-00264-HRH, CV-90-00484-HRH

The Alaska State Legislature filed an emergency motion for leave to intervene or, in the alternative, for substitution or, in the alternative, for stay, as well as a memorandum in support of its motion. The Alaska State Attorney General and the United States filed letter briefs opposing the emergency motion. After considering the letter briefs and the authorities cited therein, we conclude the Alaska State Legislature is not empowered under state law to intervene in this appeal.

IT IS ORDERED that the Alaska State Legislature's alternative motions for intervention, substitution, and stay of the stipulated dismissal are DENIED.

IT IS FURTHER ORDERED that the issue covered by the dismissal stipulated is dismissed from the case and need not be addressed at oral argument.

FOR THE COURT

CATHY A. CATTERSON
CLERK OF COURT

By: _____
Deputy Clerk

STATE of Alaska, Plaintiff-Appellant,

v.

Bruce BABBITT, Secretary of the Interior, et al., Defendants-Appellees.

Katie John, et al., Plaintiffs-Appellees,

v.

United States of America, et al., Defendants-Appellants.

Nos. 94-35480, 94-35481.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Feb. 8, 1995.

Filed April 20, 1995.

Appeals from the United States District Court for the District of Alaska H. Russel Holland, District Judge, Presiding.

Joanne M. Grace, Assistant Attorney General, Anchorage, Alaska; for the plaintiff-appellant-plaintiffs-appellees.

Elizabeth Ann Peterson, United States Department of Justice, Washington, D.C., for the defendants-appellees-defendants-appellants;

Robert T. Anderson, Native American Rights Fund, Anchorage, Alaska, defendant-appellee-plaintiff-appellee.

Before WRIGHT, HALL and WIGGINS, Circuit Judges.

WRIGHT, Circuit Judge.

*1 These appeals arise from the efforts of Katie John, Doris Charles and the other upper Ahtna Athabaskan Indians of Mentasta Village to continue subsistence fishing at Batzulnetas as they and their ancestors have done since time immemorial. [FN1] The fishery at Batzulnetas lies near the confluence of Tanada Creek and the Copper River and within Wrangell-St. Elias National Park. They also involve the claim by the state of Alaska that the Secretaries of the Interior and Agriculture, on behalf of the federal government, are attempting to exercise too much control over fish and wildlife management within the state.

The Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. s 3101 et seq., requires that subsistence fishing and hunting be given a priority over other uses of fish and wildlife on "public lands.' ' The sole issue remaining in this appeal concerns the meaning of the definition of public lands in s 102 of ANILCA. 16 U.S.C. s 3102. [FN2] Specifically, the parties dispute whether navigable waters fall within the statutory definition of public lands and are thus subject to federal management to implement ANILCA's subsistence priority. [FN3]

The district court adopted a highly expansive definition of public lands, holding that the subsistence priority applies to all Alaskan waters subject to the federal navigational servitude. We disagree. Instead, we hold that the subsistence priority applies to navigable waters in which the United States has reserved water rights. We hold also that the federal agencies that administer the subsistence priority are responsible for identifying those waters. We therefore reverse and remand to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

In 1958, Congress preserved aboriginal fishing rights in the Statehood Act. Act of July 7, 1958, Pub. L. 85-508, s 4, 72 Stat. 339. But in 1960, after assuming responsibility for fish and wildlife management, the state closed the fishery at Batzulnetas and other traditional subsistence fisheries. In 1971, Congress extinguished aboriginal fishing rights. 43 U.S.C. s 1603(b).

Congress expected that the state and the federal agencies would protect subsistence hunting and fishing. 1971 U.S.C.C.A.N. 2247, 2250. In 1980, frustrated with their failure to do so, Congress enacted ANILCA. Title VIII of ANILCA required that rural Alaska residents be accorded a priority for subsistence hunting and fishing on public lands. 16 U.S.C. ss 3113, 3114. Pursuant to s 805(d) of ANILCA, 16 U.S.C. s 3115(d), Congress gave the state authority to implement the rural subsistence preference by enacting laws of general applicability consistent with ANILCA's operative provisions. In anticipation of ANILCA's passage, the state enacted laws consistent with Title VIII which gave rural residents a subsistence priority. In 1982, after Congress enacted ANILCA, the Secretary of the Interior certified the state to manage subsistence hunting and fishing on public lands.

*2 Congress could not have anticipated the next chain of events. In 1989, the Alaska Supreme Court struck down the state act granting the rural subsistence preference as contrary to the Alaska state constitution. McDowell v. Alaska, 785 P.2d 1 (Alaska 1989). It stayed its decision to give the legislature an opportunity to amend the constitution or otherwise bring its program into compliance with ANILCA. The legislature, however, failed to act during either its regular or special session.

In 1990, the federal government withdrew Alaska's certification and took over implementation of Title VIII. The Secretary of the Interior, on behalf of all concerned federal agencies, published temporary subsistence management regulations which adopted a very narrow definition of public lands, explaining that "navigable waters generally are not included within the definition of public lands.' ' 55 Fed. Reg. 27,114, at 27,115 (June 29, 1990). The final regulations did not differ significantly. See 57 Fed. Reg. 22,940, at 22,942 (May 29, 1992).

Katie John and the state brought separate actions against the federal agencies; Katie John challenged the regulations that provided that public lands excluded navigable waters and the state challenged the federal government's authority to regulate in this area at all. The district court ordered these actions consolidated and that other actions raising similar issues be jointly managed. [FN4] After consulting with counsel for the parties in the jointly managed cases, the district court decided to address the fundamental issue of whether navigable waters are public lands before resolving other issues. [FN5]

Katie John argued that public lands include virtually all navigable waters, by virtue of the federal navigational servitude. The state contended that public lands exclude navigable waters. Prior to oral argument before the district court, the federal agencies agreed with the state. But at oral argument, those agencies modified their position, arguing that public lands include those navigable waters in which the federal government has an interest under the reserved water rights doctrine.

On cross-motions for summary judgment, the district court concluded that public lands include all navigable waters encompassed by the navigational servitude. Subsequently, the district court stayed its decision and certified the issue of whether public lands include navigable

waters for interlocutory appeal. [FN6] Both the state and the federal agencies appeal.

II. ANALYSIS

We consider two questions when we review an agency's construction of a statute that it administers. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984). First, we consider "whether Congress 'has directly spoken to the precise question at issue' either in the statute itself or in the legislative history.' " Railway Labor Executives' Ass'n v. ICC, 784 F.2d 959, 963 (9th Cir. 1986) (quoting Chevron, 467 U.S. at 842). Second, if Congress has not directly spoken to that precise question, we consider "whether the agency's answer is based on a permissible construction of the statute.' " Chevron, 467 U.S. at 843.

*3 Under ANILCA, "the term 'public lands' means land situated in Alaska which ... are Federal lands.' " 16 U.S.C. s 3102(3). "The term 'Federal land' means lands the title to which is in the United States.' " 16 U.S.C. s 3102(2). And "[t]he term 'land' means lands, waters, and interests therein.' " 16 U.S.C. s 3102(1). In other words, public lands are lands, waters, and interests therein, the title to which is in the United States. Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 548 n.15 (1987).

As noted above, the parties dispute whether navigable waters are public lands. At one extreme, the state maintains that ANILCA's definition of public lands excludes all navigable waters because the federal government does not hold title to them by virtue of the navigational servitude or the reserved water rights doctrine. At the other extreme are Katie John and amici curiae Peratrovich Plaintiffs who argue that all navigable waters are public lands. Katie John says this is so because the navigational servitude defines the scope of public lands. The Pera-

trovich Plaintiffs say this is so because, in ANILCA, Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in navigable waters. [FN7] In the middle are federal agencies contending that public lands include certain navigable waters, defined by the reserved water rights doctrine. [FN8]

ANILCA's language and legislative history indicate clearly that Congress spoke to the precise question of whether some navigable waters may be public lands. They clearly indicate that subsistence uses include subsistence fishing. See, e.g., 16 U.S.C. s 3113. And subsistence fishing has traditionally taken place in navigable waters. Thus, we have no doubt that Congress intended that public lands include at least some navigable waters. [FN9]

Unfortunately, ANILCA's language and legislative history do not give us the clear direction necessary to find that Congress spoke to the precise question of which navigable waters are public lands. ANILCA itself refers only to "lands, waters, and interests therein, the title to which is in the United States.' ' It makes no reference to navigable waters. The legislative history is also unhelpful, containing only a single reference to navigable waters. See 126 Cong. Rec. 20278-80 (Nov. 12, 1980) (statement of Rep. Udall). Lacking clear direction, we must decide whether the federal agencies' conclusion that public lands include some navigable waters under the reserved water rights doctrine is based on a permissible construction of the statute.

A. Navigational Servitude

The navigational servitude describes the paramount interest of the United States in navigation and the navigable waters of the nation. United States v. Certain Parcels of Land, 666 F.2d 1236, 1238 (9th Cir. 1982). It derives from the Commerce Clause. Kaiser Aetna v. United States, 444 U.S. 164, 177 (1979). It is "a concept of

power, not of property.' ' Certain Parcels, 666 F.2d at 1238 (citing United States v. Twin City Power Co., 350 U.S. 222, 224-25 (1956)).

*4 We have held that the navigational servitude is not "public land' ' within the meaning of ANILCA because the United States does not hold title to it. City of Angoon v. Hodel, 803 F.2d 1016, 1027 n.6 (9th Cir. 1986), cert. denied, 484 U.S. 870 (1987). Contrary to the district court's opinion, the Supreme Court has not limited that holding. In Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987), the Court rejected the assertion that the Outer Continental Shelf (OCS) is not "Federal land' ' because the United States does not hold title to it. Id. at 548 n.15. The Court explained in dictum that, while the United States may not hold "title' ' to the OCS, it was hesitant to conclude that the United States did not have "title' ' to ' 'any interests therein.' ' Id. But its dictum indicates only that, while the United States may not hold title to land, it may hold title to interests (e.g., mineral rights) in that land.

For this reason, we reject the argument that the navigational servitude is an "interest ... the title to which is in the United States,' ' such that all navigable waters are public lands within the meaning of ANILCA.

B. Commerce Clause

Neither the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters. Although Congress explicitly invoked its authority under the Commerce Clause to protect and provide the opportunity for continued subsistence uses on the public lands, see 16 U.S.C. s 3111(4), its invocation of that authority is also consistent with an implicit reservation of waters under the reserved water rights doctrine.

Congressman Morris Udall inserted a statement in the Congressional Record that ANILCA's definition of public lands included all navigable waters throughout Alaska. See 126 Cong. Rec. 29260, 20278-80 (Nov. 12, 1980) (statement of Rep. Udall). He did so, however, after the Senate had passed ANILCA, after the House had finished debating it, and shortly before the House voted on it. His views deserve little weight. See NLRB v. Fruit & Vegetable Packers & Warehouseman, 377 U.S. 58, 66 (1964) ("these statements could represent only the personal views of these legislators, since [they] were inserted in the Congressional Record after passage of the Act' ').

We reject the argument that Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in all Alaskan navigable waters.

C. Reserved Water Rights

Under the reserved water rights doctrine, when the United States withdraws its lands from the public domain and reserves them for a federal purpose, the United States implicitly reserves appurtenant waters then unappropriated to the extent needed to accomplish the purpose of the reservation. Cappaert v. United States, 426 U.S. 128, 138 (1976). The United States may reserve "only that amount of water necessary to fulfill the purpose of the reservation.'' Id. at 141. The United States' authority to reserve unappropriated waters derives from the Commerce Clause and the Property Clause. Id. at 138.

*5 In determining whether the reserved water rights doctrine applies, we must determine whether the United States intended to reserve unappropriated waters. Id. at 139. Intent is inferred if those waters are necessary to accomplish the purposes for which the land was reserved. Id.; United States v. New Mexico, 438 U.S. 696, 702 (1978). It follows that courts must conclude that "without

the water the purposes of the reservation would be entirely defeated.' ' Id. at 700.

The United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes. [FN10] In doing so, it has also implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations. By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters.

For these reasons, we hold that the federal agencies' conclusion, that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine, is reasonable. We also hold that the federal agencies that administer the subsistence priority are responsible for identifying those waters.

III. CONCLUSION

We recognize that our holding may be inherently unsatisfactory. By holding that public lands include some specific navigable waters as a result of reserved water rights, we impose an extraordinary administrative burden on federal agencies. We accept a complicated regulatory scheme requiring federal and state management of navigable waters. Let us hope that the federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management. As long as federal and state regulation is necessary, we expect the federal agencies and the state to cooperate fully to protect and provide the opportunity for subsistence fishing in navigable waters.

If we were to adopt the state's position, that public lands exclude navigable waters, we would give meaning to the term "title" in the definition of the phrase "public lands." But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing.

If we were to adopt Katie John's position, that public lands include all navigable waters, we would give federal agencies control over all such waters in Alaska. ANILCA does not support such a complete assertion of federal control and the federal agencies do not ask to have that control.

The issue raised by the parties cries out for a legislative, not a judicial, solution. If the Alaska Legislature were to amend the state constitution or otherwise comply with ANILCA's rural subsistence priority, the state could resume management of subsistence uses on public lands including navigable waters. Neither the heavy administrative burden nor the complicated regulatory scheme that may result from our decision would be necessary. If Congress were to amend ANILCA, it could clarify both the definition of public lands and its intent. Only legislative action by Alaska or Congress will truly resolve the problem.

***6 REVERSED and REMANDED.**

FN1. The following amici curiae also seek to continue subsistence fishing in particular navigable waters: the Peratrovich Plaintiffs whose ancestors fished in marine waters in the Alexander Archipelago and within the Tongass National Forest; the Tlingit, Haida and Tsimshian Indians of the Sitka Tribe whose ancestors also fished in marine waters; the Yup'ik Eskimos of the Villages of Quinhagak and Goodnews Bay whose ancestors fished at the mouths of the Kanektok and Goodnews Rivers; and the Native Alaskans of the Village of Elim and the Nome Eskimo Community whose ancestors fished along the coast of the Seward Peninsula in northern Norton Sound.

FN2. Another issue originally raised in this appeal was whether Title VIII of ANILCA authorizes the federal government to manage subsistence fishing and hunting on public lands in the absence of Alaska laws implementing the subsistence priority. The district court held that ANILCA does, in fact, authorize the appropriate federal agencies to promulgate regulations if the state does not or cannot do so. After briefing was completed in this court, but before oral argument, the parties, including the state of Alaska, stipulated to the dismissal with prejudice of that issue. We accepted the stipulation.

The Alaska Legislature, angry with the Governor's directive to the Attorney General to stipulate to the dismissal, filed an emergency motion for intervention and, in the alternative, for substitution, or for stay. We denied its motion, concluding that the Legislature was not empowered under state law to intervene in the appeal. In light of the dismissal with prejudice of that issue, the district court's holding on this issue stands.

FN3. As the parties do not dispute whether nonnavigable waters are public lands, we do not address that issue.

FN4. The jointly managed cases include: Kluti Kaah Native Village of Copper Ctr. v. Alaska, No. A90-0004-CV, Fish & Game Fund v. Alaska Bd. of Fisheries, No. A92-0443-CV, Peratrovich v. United States, No. A92-0734-CV, Native Village of Stevens v. McVee, No. A92-0567-CV, and Native Village of Quinhagak v. United States, No. A93-0023-CV.

FN5. The district court also characterized as fundamental the issue of whether ANILCA authorizes federal agencies to manage subsistence fishing and hunting on public lands in the absence of consistent Alaska laws. As discussed supra at note 2, that issue is not before us.

FN6. Similarly, it certified the issue of whether ANILCA authorizes federal agencies to manage subsistence fishing and hunting on public lands in the absence of consistent Alaska laws for interlocutory appeal. But see supra at note 2.

FN7. In addition to their Commerce Clause argument, amici curiae Peratrovich Plaintiffs join in Katie John's navigational servitude argument.

FN8. In addition to their navigational servitude and Commerce Clause arguments, Katie John and amici curiae Peratrovich Plaintiffs alternatively contend that the reserved water rights doctrine defines the scope of public lands.

FN9. Our interpretation of the term public lands in this case will not allow the United States to usurp state power over navigable waters elsewhere. ANILCA applies only to Alaska and our interpretation of its definition of public lands is necessary to give meaning to its purpose of providing an opportunity for a subsistence way of life.

FN10. These statutes include, but are not limited to, acts reserving land for national parks, forests and wildlife preserves, the Statehood Act, the Alaska Native Claims Settlement Act and ANILCA itself.

(CITE AS: 1994 WL 487830 (D.ALASKA))

Katie JOHN, et al., Plaintiffs,
v.
UNITED STATES of America, et al., Defendants.
STATE OF ALASKA, Plaintiff,
v.
Bruce BABBITT, Secretary of the Interior, et al., Defendants.
Nos. A90-0484-CV (HRH), A92-0264-CV (HRH).

United States District Court, D. Alaska.

March 30, 1994.

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DECISION

HOLLAND, Chief Judge.

Introduction

*1 The above consolidated cases are part of a group of cases under joint management, [FN1] all of which raise important issues concerning the interpretation and application of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). 16 U.S.C. ss 3111-3126. During consultation with counsel for all of the parties in the jointly managed cases, a consensus was reached regarding the prioritizing of two issues to be decided by the court in these cases. These issues are: who is entitled to manage fish and game within Alaska for purposes of ANILCA, and where does ANILCA apply?

Background

Effective December 18, 1971, Congress adopted the Alaska Native Claims Settlement Act (ANCSA). Pub.L. No. 92-203 (85 Stat. 688). [FN2] Section 17(d)(2) [FN3] of ANCSA made provision for the withdrawal from all forms of appropriation of 80 million acres of unreserved public lands in the State of Alaska for possible addition to or creation of national parks and the like. Section 17(d)(2)(A). The Secretary of the Interior was required to make periodic recommendations to Congress with respect to such lands, Section (d)(2)(C), and, by Section (d)(2)(D), Congress had five years within which to act upon the Secretary's recommendations. Not until December 2, 1980, [FN4] did Congress finally adopt the "(d)(2)" lands bill.

Pub.L. No. 96-487, (94 Stat. 2374). [FN5] Adopting the (d)(2) lands bill was not easy. The matter was under consideration by Congress during three presidential administrations and five sessions of Congress.

Through Title VIII of ANILCA, Congress addressed the important question of how all public lands, not just those in various management systems, should be used. More particularly, Title VIII embodied a congressional decision that those who chose to should have a right to continue to live off the land--to hunt and fish at will for sustenance. Congress found and declared in Section 801 of ANILCA [FN6] that:

> (1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;
>
> (2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;
>
> (3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;
>
> *2 (4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act [43

U.S.C.A. s 1601 et seq.] and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents;

and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

In Section 802 of ANILCA, [FN7] Congress further declared it to be national policy that:

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes of each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;

(2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in

> order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for non-wasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and
>
> (3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

After defining the term "subsistence uses", [FN8] ANILCA Section 804 established non-wasteful subsistence uses as having "priority" over the taking on public lands of fish and wildlife for other purposes. With this background, we come to the statutory provision which is the focal point of the question: who is entitled to regulate the taking of fish and game on public lands in Alaska for subsistence purposes? ANILCA Section 805(d) [FN9] provides that:

> *3 The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from December 2, 1980, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115, of this title, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this subchapter for the taking of fish and wildlife on the public lands for subsistence uses. .....

The State of Alaska enacted such a law. Indeed, the State of Alaska was so anxious to maintain its role as the sole regulator of fish and game in the state that it had en-

acted a subsistence law of its own two years before Congress finished the business of fine-tuning and enacting a federal subsistence law, Title VIII of ANILCA. [FN10] In due course, the Secretary determined that the State of Alaska was in compliance with ANILCA such that state law superseded federal subsistence law. As a consequence, the Secretary was not required to take action and there was no controversy over his role. It is undisputed that during this phase of the implementation of Title VIII of ANILCA, the Secretary's role was to monitor state subsistence activity, ANILCA Section 806, [FN11] and to carry on his other "closure and other administrative authority over the public lands[.]" ANILCA Section 805(c). [FN12]

By the mid-1980s, implementation of the state subsistence law for the benefit of rural Alaskans was in full swing. Not surprisingly, there was litigation. The State of Alaska had failed to provide plaintiff Katie John and others with an opportunity to pursue their traditional fishing activities at a site known as Batzulnetas. In 1985, Katie John filed suit in this court, seeking enforcement of her subsistence rights. In this regard, Congress expressly provided for district court jurisdiction over the State as regards its implementation of ANILCA. ANILCA Section 807(a). [FN13] This was but one of a number of similar cases, some involving fisheries, others involving game. From the court's perspective, the state subsistence program was working, albeit more slowly than rural Alaskans would have preferred. There were substantial legal difficulties, especially over the concept of what constituted "rural" Alaska. *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312 (9th Cir. 1988), *cert. denied*, 491 U.S. 905, 109 S.Ct. 3187 (1989).

However, the court is convinced that the state subsistence program could and would have succeeded but for the discovery of a constitutional flaw. In 1989 (a rehearing

was denied in March of 1990), the Alaska Supreme Court decided *McDowell v. State*, 785 P.2d 1 (Alaska 1989). In that case, the plaintiff successfully challenged the state subsistence program on the theory that the preference for rural Alaskans was unconstitutional. In this regard, the Alaska Supreme Court held:

> *4 [T]he requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.

McDowell, 785 P.2d at 9.

In consideration of the fact that the Alaska Legislature would be in the session in the spring and early summer of 1990, the State of Alaska sought and obtained a stay of the operative effect of the *McDowell* decision. The Alaska Legislature failed to resolve the dilemma posed by the fact that Title VIII of ANILCA absolutely required a rural limitation in order for Alaska's subsistence law to qualify as a substitute for the federal subsistence scheme, whereas the Alaska Constitution prohibited such a residency requirement. Owing to the seriousness of this constitutional dilemma, the governor of the State of Alaska convened a special session of the legislature to take up the subsistence problem in June of 1990. Like the general session, the special session failed to find a solution to the problem.

In the meantime, the State of Alaska proceeded in the state superior court to obtain a determination of whether the exclusion of the rural preference provision of Alaska's subsistence law vitiated the entire state law or was severable. On June 20, 1990, the superior court ruled that the rural limitation was severable from the remaining portions of Alaska's subsistence law, and that the remainder of AS 16.05.258 was viable.

In the meantime, the Secretary, anticipating that he would be called upon to implement ANILCA as to federal lands, took action to promulgate temporary regulations for subsistence hunting and fishing in the State of Alaska.

Summarizing his regulatory action, the Secretary stated:

> This rule provides temporary regulations implementing the subsistence priority for rural residents of Alaska under Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) of 1980. The Alaska Supreme Court recently ruled that the law used by the State of Alaska to provide the subsistence priority required by Title VIII violated the Alaska Constitution. The court's action placed the State out of compliance with Title VIII. Since the State has been unable to return to compliance with Title VIII, the Federal government is required to take over the implementation of Title VIII on public lands.

55 Fed.Reg. 27,114 (June 29, 1990). The Secretary's regulations became effective July 1, 1990, the date the *McDowell* decision was to be effective.

Citing the shortness of time available for deliberation and the possibility for "chaos" if the State were able to reinstitute its program, the Secretary in substance adopted the former state subsistence hunting and fishing program. *Id.* The Secretary's implicit wish that the State would find a solution to its constitutional problem was not, nor has it yet been, fulfilled. In due course, the temporary regulations were supplanted by permanent regulations. These permanent regulations, among other things, created the Federal Subsistence Board and invested it with authority to adopt regulations for the day-to-day management of subsistence hunting and fishing on public lands in Alaska. 57 Fed.Reg. 22,940 (May 29, 1992).

I.
Who is Entitled to Manage Fish and Game within Alaska for Purposes of ANILCA?

*5 The State has moved for summary judgment on Count III of its first amended complaint in *State of Alaska v. Babbitt* [*et al.*], No. A92-0264-CV. [FN14] The motion is opposed, and the court has invited briefing from the parties to the other jointly managed cases, some of whom have submitted briefs on this issue. Oral argument has been heard and, after further analysis of certain aspects of this portion of the case, the court called for and received supplemental briefing. The State raises the fundamental question: does the Secretary [FN15] have specific authority to adopt a comprehensive scheme for fish and wildlife management on "public lands" as defined in Section 102 of ANILCA? [FN16]

There is no disagreement about the fact that the *McDowell* decision abrogated the rural preference provision of the Alaska subsistence law. There is no dispute but that the rural preference is an essential element of the federal program. ANILCA Section 803. [FN17] The State contends, largely upon Sections 805(a) through (c) and 1314 of ANILCA [FN18] and its analysis of the legislative history of ANILCA, that Title VIII simply does not vest the Secretary with authority to assume day-to-day management of fish and game for subsistence purposes on public lands. The federal defendants, as well as Katie John and others, insist that the combination of Title VIII and the *McDowell* decision required the federal government generally, and the Secretary in particular, to assume implementation of Title VIII of ANILCA.

ANILCA Section 803 [FN19] unmistakably and unambiguously establishes a preference in favor of rural Alaskans as regards the taking of fish and wildlife from

public lands. Although it is counter-intuitive to think that Congress would enact a law creating such a right and not authorize the Executive Branch to implement it, this contention of the State of Alaska is not without substance. However, for the reasons and upon the authorities discussed below, the court has concluded that unless and until the State of Alaska shall again be in compliance with Section 805(d) of ANILCA, [FN20] the Secretary has the authority to adopt regulations for the purpose of implementing Sections 803, [FN21] 804, [FN22] and 805 [FN23] of ANILCA.

ANILCA Section 805(a) requires the Secretary, in consultation with the State, to establish subsistence resource regions and local and regional advisory groups, "[e]xcept as otherwise provided in subsection (d)[.]" The Alaska subsistence law being out of compliance with Title VIII, the Secretary is plainly obligated to establish these subsistence resource regions and appoint local and regional advisory groups.

ANILCA Section 805(b) requires that the Secretary assign staff sufficient to permit the local and regional advisory groups to do their work. ANILCA Section 805(c) is the provision which is critical to the State's argument. It provides:

> The Secretary, in performing his monitoring responsibility pursuant to section 3116 of this title and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommen-

> dation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

*6 Section 805(c) speaks of the Secretary's monitoring responsibilities, his power to effect closures of certain lands for subsistence uses (ANILCA Section 816 [FN24]) and his other administrative authorities over public lands, but says not a word about implementing the subsistence preference for rural Alaskans created by Section 803 or the subsistence priority created by Section 804. It is in this context that the State invokes the provisions of ANILCA Section 1314 [FN25] which provide:

> (a) Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in [Title VIII of this Act [FN26]], or to amend the Alaska constitution.
>
> (b) Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.

Traditionally in the United States, and Alaska is no exception, the federal government has deferred to state fish and game regulators with respect to the management of fish and game on federal lands. *Defenders of Wildlife v. Andrus,* 627 F.2d 1238, 1248 (D.C.Cir.1980). The Alaska Statehood Act [FN27] made express provision for the transfer of authority to manage fish and game to the State of Alaska after it had established an appropriate system and demonstrated its ability to assume responsibility for such management from the federal, territorial fish and game regulators. It is in this context that the State argues that it is entitled to continue management of fish and game on public lands unless Title VIII of ANILCA provides otherwise. Again, the State's contention is that Title VIII, as discussed above, does not provide otherwise. The

State's foregoing position is underscored by the parallel provision of ANILCA Section 1314(b), [FN28] which serves to maintain the status quo as far as the authority of the Secretary.

Count III of the State's amended complaint calls upon the court to review the Secretary's construction of Title VIII of ANILCA. In *Chevron USA, Inc. v. Natural Resource Defense Council,* 467 U.S. 837, 843 (1983), the United States Supreme Court adopted a two-part test for evaluating agency construction of a statute. The court must first determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If, having employed the traditional tools of statutory construction, the court determines that the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. In such situations, the court owes no particular deference to the administrators. The court must reject a statutory interpretation reached by administrative authorities that is contrary to the clearly expressed intent of Congress. *Id.* at n. 9.

*7 If the court determines that Congress has not clearly stated its intention either by the express language of a statute or otherwise -- that is, if the court determines that there is a gap in the statute -- [T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 843. The agency construction need not be the only possible interpretation, it must simply be a reasonable one. [FN29] *Id.* at 844.

It is difficult to square the Secretary's interpretation of Title VIII of ANILCA with the express language of

these provisions. It is the Secretary's view that he must step in and implement ANILCA Section 804 following the failure of the state subsistence program implemented under ANILCA Section 805(d). [FN30] As discussed above, Congress has simply not enacted any express, direct authorization that the Secretary implement the rural preference and subsistence priority if the State does not do so.

As the United States Supreme Court makes clear in *Chevron*, the court may employ "traditional tools of statutory construction" [FN31] for the purpose of determining congressional intent. The State and the court have looked to the legislative history of ANILCA which is voluminous. [FN32] The State provided an initial analysis of legislative history pertinent to the question before the court. The court was not satisfied with this initial analysis and conducted an independent evaluation of the legislative history. That evaluation was the subject of a preliminary order. [FN33] In this order, the court invited the parties to file supplemental briefs, which have been filed and have been considered by the court.

The court's final appraisal of the legislative history pertinent to the question of whether or not the Secretary has primary authority to implement ANILCA Section 804 in the absence of a state program is contained in an appendix attached to this decision. As detailed in the appendix, Congress started out with the proposition that the Secretary, and he alone, would manage a subsistence hunting and fishing program for rural Alaskans. Through the various legislative sessions, the role of the Secretary was consciously and intentionally reduced, and the role of the State was correspondingly increased. The State accurately points out that Congress expressly rejected a program wholly within the control of the Secretary.

It simply does not follow, however, that Congress intended that the State continue day-to-day management of

fish and game for subsistence purposes, in the absence of a state law of general application sufficient to supersede ANILCA Sections 803 through 805. See ANILCA Section 805(d). [FN34] The court concludes that Congress unintentionally and inadvertently omitted an express provision authorizing the Secretary to implement Section 804 in the absence of a state program.

*8 By ANILCA Section 814, [FN35] Congress expressly authorized the Secretary to promulgate, "such regulations as are necessary and appropriate to carry out his responsibilities under this [Title]." Congress having unequivocally given the Secretary regulatory authority, he was empowered to fill the statutory gap so as to implement not only the policy contained in ANILCA Section 802, [FN36] but also effect the substantive preference established by ANILCA Section 803 [FN37] for rural Alaskans.

The final step in the analysis required by *Chevron* involves the question of whether or not the agency decision embodies a reasonable interpretation of the statute. In this instance, the Secretary's interpretation may be the only reasonable one which could follow the State's forced withdrawal from a qualifying subsistence program. Certainly implementation of ANILCA Section 804 by the Secretary through the creation of a Federal Subsistence Board was a reasonable response, even if it were not the only possible response to the failure of the state program. The State cannot say that the Board's initial regulations were unreasonable, for the Board in substance adopted the State's pre-*McDowell* subsistence program through temporary regulations. This action provided a smooth transition from state to federal management of the rural subsistence program for public (federal) lands.

The State has made a number of other arguments in support of its position.

One of them is particularly intriguing. The State argues that, despite *McDowell*, it may voluntarily submit to the jurisdiction of this court for purposes of carrying out a qualifying subsistence program as to public (federal) lands. The State seems to argue that it can carry out such a program without doing violence to the Alaska Constitution as applied to subsistence programs in *McDowell* so long as such program is effected through a court decree. [FN38]

What the State urges is problematic and is rejected for a number of reasons.

Firstly, the State is no longer in compliance with the requirements of Section 805(d), [FN39] and therefore federal court jurisdiction over any state program is very dubious. The court is unable to identify, and the State has not suggested, the source of power for a state fish and game regulator to take action to implement a rural Alaskan preference. Since *McDowell*, no state law may constitutionally authorize such. Even if that obstacle were overcome, what the State suggests smacks of a violation of the separation of powers doctrine.

Secondly, the State's proposal carefully avoids suggesting that the State would be enacting regulations. Rather, the State would seemingly have the court provide continuing supervision through court decrees which would serve as the subsistence program. ANILCA Section 805(d) [FN40] expressly contemplated a state program carried out through a "state rulemaking authority". ANILCA Section 807(a) [FN41] plainly contemplates court review of that state rule-making, and if the state regulations on a subject are found wanting, there is a requirement for the submission of replacement regulations for court approval and incorporation in a decree. This arrangement vests the court with jurisdiction to provide a standard judicial remedy: review of administrative rule-making. What the

State suggests is that the court in substance become the rule-maker.

*9 Thirdly, there is a substantial risk of state court litigation which could seek to prevent the state from doing by indirection what the Alaska Supreme Court has expressly found to be unconstitutional--a rural Alaskan preference. Although this subject was not developed by the parties, it is the view of the court that such a suit would likely be successful.

The court and, judging from the summary and background statements that preceded his temporary regulations, [FN42] the Secretary viewed the dual federal-state fish and game management situation as undesirable. It would be far preferable for there to be a unified, federally-qualified subsistence hunting and fishing program in the State of Alaska. One program would undoubtedly cost less, and would certainly be less complex in its implementation and operation. With that view before it, the court has seriously considered that sometimes situations must get worse before they get better, and a determination that Congress did not expressly (in ANILCA Section 805(a) through (c)) or impliedly authorize the Secretary to establish a subsistence hunting and fishing program in Alaska upon the failure of the state program, would certainly precipitate a crisis. Perhaps such a crisis would motivate either Congress or the state legislature to solve the problem which confronts all of us. However, the clarity of the congressional policy and purpose of ANILCA Title VIII, coupled with the clear grant of general regulatory power to the Secretary, convince the court that the position taken by the Secretary is both authorized and reasonable. The court cannot in good conscience reach the crisis-precipitating decision for which the State argues.

The court concludes that the Secretary, not the State of Alaska, is entitled to manage fish and game on public

(federal) lands in Alaska for purposes of Title VIII of ANILCA. The State's motion for partial summary judgment [FN43] on Count III of its amended complaint is denied; and the court, on its on motion, concludes that the contentions contained in said Count III are without merit and subject to dismissal.

II.
Where Does ANILCA Apply?

The first issue has to do with "who" is entitled to regulate. The second issue addressed by this decision has frequently been referred to by the parties as the "where" issue. Assuming that the Secretary does have jurisdiction over the day-to-day management of fish and game for subsistence purposes, the parties disagree as to what lands are subject to the Secretary's regulation.

In their second amended complaint for declaratory and injunctive relief, [FN44] plaintiffs Katie John, Doris Charles, and the Village Council of Mentasta (the "plaintiffs") contend for their first cause of action that the waters of Tanada Creek and the Copper River are "public lands" as defined by Section 102 [FN45] of ANILCA. First by temporary regulations (55 Fed.Reg. 27,114 (June 29, 1990)), and, more recently, by permanent regulations (57 Fed.Reg. 22,940 (May 29, 1992)), the Secretary has taken the position that navigable waters within the State of Alaska are not "public lands" for purposes of ANILCA. For purposes of this case, it is undisputed that the fishing site which is the subject of Katie John's complaint is on navigable waters.

*10 The plaintiffs have moved for summary judgment on the "where" or "public lands" issue. [FN46] The federal defendants have responded with motions to dismiss or, in the alternative for summary judgment. [FN47] The State of Alaska, co-defendant with the federal defendants

as to the Katie John complaint, also move to dismiss the plaintiff's claim. [FN48] These motions are all opposed. Here again, the court has invited parties to the jointly managed cases to take a position on the public lands issue, and some have done so. The court has heard oral argument.

Background

The site which has formed the basis for development of the "where" issue is near a fish camp situated at the confluence of Tanada Creek and the Copper River and is within the boundaries of Wrangell-St. Elias National Park and Preserve. This camp was once the location of a village known as "Batzulnetas". The village was abandoned in the early 1940's but a subsistence fishery continued there for many years.

Tanada Creek is a part of the Copper River system. Approximately 120 known sockeye and other salmon stocks ascend the Copper River system each year. The fish stocks mix with one another, and at a given time some twenty or more stocks may be migrating up the river. The Copper River sockeye stocks are harvested commercially near the mouth of the Copper River.

In 1964, the Alaska Board of Fish and Game closed Batzulnetas to fishing with nets and fishwheels. In 1984, Katie John and Doris Charles submitted a proposal to the Alaska State Board of Fisheries requesting that the Batzulnetas area be opened to subsistence fishing. The proposal was denied.

In 1985, plaintiffs filed a law suit against the State (*Katie John v. State of Alaska*, No. A85-0698-CV (D. Alaska) (hereinafter "*Katie John I*")) under ANILCA Section 807(a). [FN49] The suit resulted in informal negotiations between the parties and an agreement to allow a limited fishery at Batzulnetas. In 1988, the Alaska Board of

Fisheries adopted a regulation that allowed limited fishing at the Batzulnetas site. 5 AAC s 01.647(i).

In 1989, in continuation of *Katie John I,* the plaintiffs sought preliminary relief from the regulation that limited fishing at Batzulnetas. In June of 1989, this court issued a preliminary injunction that allowed full-time fishing at Batzulnetas from June 1 through September 1, or, in the alternative, until 1,000 sockeye were taken. Order, June 6, 1989 (No. A85-0698-CV).

In January of 1990, this court invalidated the 1988 regulation (5 AAC s 01.647(i)) and ordered the Alaska State Board of Fisheries to promulgate regulations that established a subsistence fishing priority at Batzulnetas. Before the State had an opportunity to promulgate such regulations, the Alaska Supreme Court decided McDowell. [FN50] As a result of *McDowell*, the State was no longer in compliance with ANILCA, and the regulation of subsistence fishing on "public lands" in the State of Alaska was taken over by the Secretary. In order to quickly fill the regulatory void left by *McDowell,* the Federal Subsistence Board adopted temporary regulations on June 29, 1990. The temporary regulations were essentially the same as the state regulations that this court declared invalid in *Katie John I.*

*11 On September 7, 1990, plaintiffs petitioned the Federal Subsistence Board for reconsideration of the temporary regulations that applied to subsistence fishing at Batzulnetas. After considering plaintiffs' motion for reconsideration, the Federal Subsistence Board concluded that the temporary regulations were not applicable to the Batzulnetas fishery and that management of the fisheries remained with the State. This decision was based upon an administrative determination of the National Park Service that the waters of Tanada Creek and Copper River in the vicinity of Batzulnetas are navigable. The Federal Subsis-

tence Board informed the Plaintiffs that the temporary federal regulations only apply to "public lands" [FN51] and that navigable waters do not fall with the definition of "public lands". 50 C.F.R. s 100.3(b). On December 5, 1990, the plaintiffs filed a complaint against the United States of America and the Secretary. The action was again brought pursuant to ANILCA Section 807(a). [FN52] Plaintiffs state four causes of action, but only the first and second and the fourth are relevant to the issues now before this court. [FN53]

In the first cause of action, plaintiffs allege that the federal defendants are required to provide a subsistence fishery at Batzulnetas and that their refusal to do so is in violation of Title VIII of ANILCA. Plaintiffs base the first cause of action on ANILCA Section 804 [FN54] which provides a priority for the taking of fish and game for non-wasteful subsistence purposes on public lands. Plaintiffs allege that the reserved water rights doctrine and the navigational servitude in Alaska waters provide the United States with an interest in the waters of Tanada Creek and Copper River, and that these waters therefore fall within the definition of "public lands" as defined by ANILCA Section 102.

In the second cause of action, the plaintiffs allege that when the United States set aside land for plaintiffs under the Alaska Native Allotment Act of 1906, it also reserved sufficient water to fulfill the purposes of the allotments. Plaintiffs assert that such reserved water rights are interests to which the United States holds title, and thus presents an alternative reason why the waters of Tanada Creek are public lands.

In the fourth cause of action, the plaintiffs allege that the State of Alaska has no jurisdiction over the waters of Tanada Creek and the Copper River as regards subsistence

fishing since they are "public lands" as defined in ANILCA.

Accordingly, the plaintiffs request rulings that the waters of Tanada Creek and the Copper River are "public lands"; that the Secretary's refusal to provide for a subsistence fishery at Batzulnetas is a restriction of a subsistence use, contrary to Title VIII of ANILCA; that the federal defendants be ordered to promulgate regulations that provide for subsistence fishing at Batzulnetas; and that the State of Alaska has no jurisdiction to manage subsistence uses of fish in the waters of Copper River and Tanada Creek.

What Constitutes "Public Lands" under Title VIII of ANILCA?

*12 ANILCA Section 102 provides a three-tier definition of "public lands":

> As used in this Act ...
>
> (1) The term "land" means lands, waters, and interests therein.
>
> (2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.
>
> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980 ... are Federal lands....
>
> (Emphasis supplied.)

When the Secretary of the Interior took over management of the subsistence uses of fish and wildlife on public lands in June of 1990, he issued regulations that excluded all navigable waters in Alaska from the definition of public lands, and thus from the ambit of Title VIII. [FN55] Plaintiffs' complaint is a direct challenge of this regulation. To resolve this challenge, we must evaluate

the Secretary's interpretation of ANILCA Section 102. We follow the procedure and authorities discussed above [FN56] in doing so.

Congress did not define the terms "interests" or "title" in the definition of "public lands" in ANILCA, nor did it make any reference to the common law doctrines of reserved water rights or navigational servitude. The parties have not unearthed any legislative history indicating that Congress considered these doctrines when it defined the term "public lands". Since Congress has not specifically defined the terms "interests" or "title", the court's first task is to determine what kind of authority Congress gave the federal defendants, as this will fix the degree of deference which the court must give to the federal defendants' interpretation of ANILCA Section 102.

Where the governing statute contains an express delegation of legislative authority over a specific provision, Congress has in effect instructed the agency to engage in a deliberative process requiring the agency to weigh costs, benefits, and other competing interests, and arrive at a value judgment.

Hence, judicial review of such legislative determinations is at its narrowest, asking only if the agency action were arbitrary and capricious. *See, Schweiker v. Gray Panthers,* 453 U.S. 34 (1981); *Mercy Hospital of Laredo v. Heckler,* 777 F.2d 1028 (5th Cir.1985). An express delegation must be clear from the terms of the statute. *See, e.g., Batterton v. Francis,* 432 U.S. 416 (1976) (where the Secretary of Health, Education and Welfare was directed by statute to define the term "unemployment" in a provision of the Social Security Act).

ANILCA contains no such express delegation of legislative authority regarding the definition of "public lands". However, Section 102 contains an implicit delegation of power to the federal defendants.

Congress has created a program which necessarily requires the formulation of policy in order to fill a gap left by Congress. *Morton v. Ruiz,* 415 U.S. 199, 231 (1974). Section 814 [FN57] directs the Secretary to promulgate "such regulations as are necessary and appropriate to carry out his responsibilities under this [Title]." Whether the federal government holds title to an interest in a specific plot of land or column of water will depend on how "interests" and "title" are defined. Without such further definition, the term "public lands" is ambiguous. Since these terms must be fleshed out in order for the Secretary to administer ANILCA, the Secretary necessarily has the authority to make such a determination. Consequently, the Secretary's interpretation of "public lands" is reviewed under a reasonableness standard. *Chevron,* 476 U.S. at 844.

*13 Although the Secretary received extensive comments regarding its proposed construction of the scope of Title VIII, the Secretary's rule was not accompanied by any legal analysis and merely stated in a conclusory fashion that public lands do not include navigable waterways:

> Numerous comments were received concerning the definitions of Federal lands and public lands. All of these comments focused on the issue of jurisdiction over fisheries in navigable waters. Many felt that the definitions should include navigable waters to protect subsistence use and the subsistence priority. They strongly believe it was Congress' intent to protect subsistence rights as broadly as possible. Additionally, many individuals commented that most subsistence resources are found in navigable waters.
>
> The scope of these regulations is limited by the definition of public lands, which is found in section 102 of ANILCA and which only involves lands, waters, and interests therein title to which is in the United States. Because the United States does not generally own title to the submerged lands beneath navigable waters in

> Alaska, the public lands definition in ANILCA and these regulations generally excludes navigable waters.
>
> Consequently, neither ANILCA nor these regulations apply generally to subsistence uses on navigable waters. However, based upon specific pre-Statehood reservations of submerged lands, s ___, 3(b) establishes that these regulations apply to navigable waters located on the identified public lands. The listed areas remain subject to change through further rule-making pending a review and determination of pre-Statehood reservations by the United States.

57 Fed.Reg. 22,940 at 22,942 (May 29, 1992). [FN58]

The plaintiffs argue that the term "public lands" in Section 102 should include all waters in which the United States has an interest by virtue of the reserved water rights doctrine and the navigational servitude. The court's task is to determine whether the Secretary's exclusion of these doctrines from his interpretation of Section 102 was reasonable. Each of the plaintiff's contentions will be examined in turn.

Reserved Water Rights Doctrine

Reservation of water rights is empowered by the Commerce Clause (U.S. Const. art. I, s 8) and the Property Clause (U.S. Const. art. I, s 3). The doctrine applies to federal enclaves, encompassing water rights in navigable and nonnavigable streams. When the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government by implication reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. The reserved water rights doctrine reserves only that amount of water necessary to fulfill the purposes of the reservation,

no more. *Cappaert v. United States,* 426 U.S. 128, 138 (1976).

The parties do not dispute that the federal government reserved certain water appurtenant to the Wrangell-Saint Elias National Park when it was established by ANILCA in 1980. Congress clearly stated the purposes for which this park was created:

> *14 To maintain unimpaired the scenic beauty and quality of high mountain peaks, foothills, glacial systems, lakes, and streams, valleys, and coastal landscapes in their natural state; to protect habitat for, and populations of, fish and wildlife including but not limited to caribou, brown/grizzly bears, Dall sheep, moose, wolves, trumpeter swans and other waterfowl, and marine mammals; and to provide continued opportunities, including reasonable access for mountain climbing, mountaineering, and other wilderness recreational activities. Subsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with [the provisions of Title VIII].

Section 201(9), 16 U.S.C. s 410hh(9) (emphasis added). Applying the *Cappaert* analysis, it is clear that an unquantified amount ?? appurtenant to the park was reserved for the purpose of providing rural Alaskans with the opportunity to pursue their subsistence rights under Title VIII.

The court declines to use the reserved water rights doctrine as a means of determining the geographic scope of the Title VIII. Although the court does not reject the notion that the reserved water rights doctrine could have some application in this case, or that it could be of primary importance in a subsistence case in some other location in Alaska, the court concludes that the geographic scope of Title VIII is better determined by use of the navigational servitude, as being more compatible with the find-

ings [FN59] and policies [FN60] of Title VIII of ANILCA.

Navigational Servitude

Although both are grounded in the Commerce Clause, the federal navigational servitude is distinct from Congress's power to regulate navigable waterways. *Boone v. United States,* 944 F.2d 1489, 1493 (9th Cir.1983), citing *Kaiser Aetna v. United States,* 444 U.S. 164, 173. Congress' authority to regulate waterways extends beyond waters that are navigable in fact, [FN61] and is as broad as the needs of commerce. *Boone,* 944 F.2d at 1493.

By contrast, the navigational servitude is described as a "dominant servitude" and a "superior navigation easement". *Id.* at 1493-94. The purpose of the navigational servitude is to relieve the government of the obligation to compensate an owner of riparian, littoral, or submerged lands for acts which normally require compensation under the Fifth Amendment. *Id.* at 1494. The Ninth Circuit has explained the difference in the geographic scope of these two concepts:

> The navigational servitude, unlike the power to regulate navigable waters under the commerce clause, is not coextensive with Congress' regulatory authority. First, unlike Congress' power to regulate waters for purposes of navigation, the navigational servitude "does not extend beyond the high-water mark" of navigable streams. *Rands,* 389 U.S. at 122, 88 S.Ct. at 266; see also *Kansas City Life Ins.,* 339 U.S. at 808, 70 S.Ct. at 890, *United States v. Willow River Co.,* 324 U.S. 499, 509, 65 S.Ct. 761, 767, 89 L.Ed. 1101 (1945). Thus, although the commerce clause power to regulate navigable waters permits, for example, regulatory authority over the non- navigable tributaries of streams, see *United States v. Grand River Dam Authority,* 363 U.S. 229, 232, 80 S.Ct. 1134, 1136, 4 L.Ed.2d 1186 (1960),

the navigational servitude would not cover the same tributaries, *see United States v. Cress*, 243 U.S. 316, 326-27, 37 S.Ct. 380, 384, 61 L.Ed. 746 (1917), *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 582, 207 Ct.Cl. 323 (1975).

*15 Second, the determination of navigability is different in different contexts. *Kaiser Aetna*, 444 U.S. at 171, 100 S.Ct. at 388. A waterway may be subject to the navigational servitude if it is navigable in fact in its natural state. *Kaiser Aetna*, 444 U.S. at 175, 100 S.Ct. at 390, *Cress*, 243 U.S. at 322-3, 37 S.Ct. at 382-83. Waterways are navigable in fact "'when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce.'" *Cress*, 243 U.S. at 323, 37 S.Ct. at 383 (*quoting The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870) (emphasis in *Cress*)).

By contrast, as explained above, navigability for purposes of the commerce clause authority to legislate, has been expanded to include both waterways once navigable but no longer so, and waterways never navigable but which may become so with reasonable improvements. *See Appalachian Electric*, 311 U.S. at 408, 61 S.Ct. at 299. Under this broad view of navigability, "[t]heoretically at least, there are no waters in the United States immune from [the power to regulate] navigation." *Morreale, supra*, at 9. *Id.* at 1495-96 (footnotes omitted). The parties in this case frame the issue as whether the navigational servitude creates only a usufructuary right in the federal government (federal and state position) or a property interest to which the federal government holds title (plaintiffs' position). While this formulation of the "where" issue is not inappropriate, it is broader than necessary. The parties tend to focus on abstractions: what is land or an interest in land, and what is title to an interest in land? At the end of this discussion, we will focus more narrowly upon ANILCA Section 102 which includes in public lands inter-

ests in "waters" and upon the purpose of Title VIII of ANILCA.

The federal defendants cite *City of Angoon v. Hodel,* 803 F.2d 1016 (9th Cir. 1986), *cert. denied,* 484 U.S. 870 (1987), for the proposition that the United States does not hold title to the navigational servitude. *Angoon* involved a conveyance of land on Admiralty Island to a Native corporation under ANCSA. The Native corporation planned to harvest timber on the land. The City of Angoon sought an injunction to prevent the harvest, and objected that a subsistence evaluation required by ANILCA Section 810 [FN62] had not been prepared. Section 810 of ANILCA applies only if the land at issue is "public land". Although the harvest would take place only on land owned by the Native corporation, the City of Angoon argued that this use of corporation lands would affect subsistence uses on public lands, thus triggering application of Section 810. *Id.* at 1027. The Ninth Circuit rejected this broad reading of "public lands" and held that Section 810 did not apply. In a footnote, the Ninth Circuit addressed the City of Angoon's argument that "the EPA's and Corps' granting of permits under sections 402 and 404 of the Clean Water Act ... required a section 810 subsistence evaluation because these determinations used 'public land': namely, a navigational servitude." *Id.* at 1027-28, n. 6.

The Ninth Circuit rejected this argument:

> *16 "Public land" is defined to include all interests in land in which the United States holds title. ANILCA s 102(1)-(2), 16 U.S.C. s 3102(1)-(2). Since the United States does not hold title to the navigational servitude, the servitude is not "public land" within the meaning of ANILCA. *See United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28, 81 S.Ct. 784, 787-88, 5 L.Ed.2d 838 (1961) (servitude is "power of government to control and regulate navigable waters in the interest of commerce") (*quoting United States v. Commodore*

> *Park*, 324 U.S. 386, 390, 65 S.Ct. 803, 805, 89 L.Ed. 1017 (1945)). For similar reasons, the Secretary was not required to perform a section 810 evaluation prior to transferring the Cube Cove lands to Shee Atika. Cube Cove is simply not "public land." See ANILCA ss 102(3)(B) and 810(c), 16 U.S.C. ss 3102(3)(B) and 3120(c).
>
> *Id.*

The state defendants treat this language as dispositive of the issue before this court. However, in *Angoon* the issues were very different from those in this case. *Angoon* did not involve the scope of federal and state management of fish, nor did it address the subtleties regarding the terms "interests" or "title" presented by this case. The Ninth Circuit's observation in *Angoon,* that the United States does not hold title to the navigational servitude, appears to be premised on the conclusion that the servitude is a "power of government" rather than a property interest. *Angoon* contains no analysis of the character of the navigational servitude.

Five years after *Angoon* was decided, the Ninth Circuit had occasion to analyze in detail the genesis and scope of the navigational servitude, and it concluded that it does consist of a property interest. *Boone v. United States,* 944 F.2d 1489 (9th Cir. 1991), was a dispute over access to a lagoon in Hawaii. The United States contended that members of the public had the right to boat on the lagoon by virtue of the government's navigational servitude. The owners of the land surrounding the lagoon sought a declaration that the lagoon was not navigable and that they could therefore deny access to the public. The district court found that the lagoon was not navigable and entered judgment for the owners. In the course of describing the history and character of the navigational servitude, the Ninth Circuit commented:

> The label, "servitude," implies a property interest. How a constitutional grant of authority to Congress creates such an interest is explained in *United States v. Twin City Power Co.*, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240 (1956). The Court stated:
>
> "The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude,' or 'a superior navigational easement.'" *17 *Id.* at 224-25, 76 S.Ct. at 261 (citations omitted).
>
> *Boone*, 944 F.2d at 1494, n. 9.

The Ninth Circuit's subsequent, and more thorough analysis of the character of the navigational servitude establishes, contrary to the comment in *Angoon*, that the servitude is not always accurately described as just a power. For purposes of ANILCA Title VIII, the navigational servitude is more properly characterized as an interest in waters. ANILCA Section 102 addresses interests in both "lands" and "waters".

The plaintiffs also argue that the Ninth Circuit's observation in *Angoon* is drawn into doubt by a subsequent Supreme Court decision, *Amoco Production Co. v. Hodel*, 480 U.S. 531 (1987). In *Amoco*, ANILCA Section 810 was once again used to challenge the action of a federal agency. The Secretary of the Interior granted oil and gas leases to oil companies off the coast of Alaska.

The plaintiffs (Native villages and corporations) challenged the Secretary's failure to follow the requirements of Section 810 of ANILCA. The Supreme Court concluded that the Outer Continental Shelf (OCS) is not "public land" as defined in ANILCA. According to Section 102, "public lands" must be within the boundaries of the State of

Alaska. The boundaries of the State of Alaska are delineated by its coastal waters which extend three miles from its coastline and end where the OCS commences.

In *Amoco,* as in *Angoon* and *Boone,* the issue on which we now focus was relegated to a footnote. The Secretary of the Interior had argued in the alternative that the United States did not hold title to the OCS. The Supreme Court indicated that Section 102 did not require fee title to be held by the United States in order for a tract to be "public land":

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States." We also reject the assertion that the phrase "public lands," in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute.

Id. at 548-49, n. 15 (citation omitted). The plaintiffs argue that since the Supreme Court reads the term "title" expansively, footnote 6 of *Angoon* has no further validity.

Footnote 15 in *Amoco* is a clear signal that the term "title" in Section 102 can refer to something less than technical fee title. This result was suggested, indeed we think required, because Section 102(1) of ANILCA expressly defines "lands" as including "interests" in both "lands" and "waters".

Footnote 9 of *Boone*, and the cases cited therein, reinforce the proposition that the United States may be considered to own an "interest" in property by virtue of the navigational servitude. The court concludes that, for purposes of Title VIII of ANILCA, the United States holds title to an interest in the navigable waters of Alaska.

*18 The court also concludes that the Secretary's construction of Section 102 was not reasonable because his interpretation of "interests" in "waters" and "title" was too narrow. The court does not reach this conclusion solely upon the basis of the foregoing authority. The court has given equal consideration to whether the position taken by the Secretary does or does not advance the congressional purpose and policy of ANILCA, which are found in ANILCA Sections 101(c) and 802(1). [FN63]

By limiting the scope of Title VIII to non-navigable waterways, the Secretary has, to a large degree, thwarted Congress' intent to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so. Much subsistence fishing and much of the best fishing is in the large navigable waterways where one has access to the most fish as opposed to the smaller tributaries or lakes where, for example, salmon go to spawn. The Tanada Creek subsistence fishery is at Batzulnetas, at the confluence of the Copper River and Tanada Creek, not far upstream in some non-navigable tributary. Fish, salmon in particular, mature on the high seas. They spawn in the shallows of far upland creeks and lakes which are reached only after passing the gauntlet of commercial fisheries in the territorial seas (especially in Prince William Sound insofar as the Copper River is concerned) and sport and Alaska's wide open subsistence fishing on the entire Copper River. The food quality of salmon is substantially degraded by the time these fish reach the spawning grounds. By the regulations which excluded navigable waters from the jurisdiction of the Federal Subsistence Board, the Secretary abandoned to the non-consistent [FN64] state subsistence program the largest and most productive waters used by rural Alaskans who have a subsistence lifestyle.

As additional grounds for its ruling, the court notes that Congress specifically invoked its constitutional authority under the commerce clause "to protect and pro-

vide the opportunity for continued subsistence uses" when it enacted Title VIII. [FN65] Thus, even if the navigational servitude is viewed as a power to regulate rather than a property interest, Congress exercised that power to protect subsistence uses by rural Alaskans.

Conclusion

The court concludes that the Secretary, not the State of Alaska, is entitled to manage fish and wildlife on public lands in Alaska for purposes of Title VIII of ANILCA. The State's motion for partial summary judgment [FN66] on Count III of its amended complaint is denied. Count III is dismissed.

The court further concludes that the Secretary's interpretation of Section 102 is unreasonable. For purposes of Title VIII, "public lands" includes all navigable waterways in Alaska. The federal defendants' motions to dismiss the plaintiff's complaint for failure to state a claim upon which relief, or in the alternative for summary judgment (Clerk's Docket Nos. 2, 17, and 121) are denied. The State of Alaska's motions to dismiss or for summary judgment (Clerk's Docket Nos. 38 and 124) are denied. The plaintiff's motion for partial summary judgment (Clerk's Docket No. 48) is granted.

APPENDIX

*19 An examination of the legislative history of Title VIII reveals the following evolution in Congressional policy.

The initial House bill sponsored by Congressman Udall (H.R. 39, Jan. 4, 1977, Vol. 1 at 204, Alaska Department of Fish and Game, Legislative History of ANILCA), [FN1] specifically provided that the Secretary of the Interior would manage subsistence uses of fish and

game on Alaska's public lands by issuing regulations on seasons and bag limits. ADFG, Vol. 1 at 222-231.

Next, the House Interior Committee proposed amendments that narrowed the Secretary's role by allowing the State of Alaska to manage subsistence uses on public lands. However, the amendments specifically stated that the Secretary could suspend the State's management and take over such management if he determined that the State's program did not comply with the subsistence preference in Title VIII (then Title VII). House Interior Committee Report, April 7, 1978, ADFG, Vol. 33 at 32-38, 186-192, 237-240.

The House Merchant Marine Committee then proposed that the Secretary's role should be limited even further. Federal regulation of subsistence uses of fish and wildlife on public lands was eliminated; the burden of all such regulation fell on the State. If the State's program did not comply with the federal subsistence preference, the Secretary was authorized to close the public lands to consumptive uses while the State redrafted its regulations. House Merchant Marine Committee Report, May 4, 1978, ADFG, Vol. 33 at 417, 496, 509-515. The House passed a version of ANILCA on May 23, 1978, that included the House Merchant Marine Committee's version of Title VIII (VII). ADFG, Vol. 2 at 419, 512-539.

The Senate Energy Committee issued a report on October 9, 1978. The Energy Committee revised the structure of Title VIII and inserted a judicial enforcement provision, Section 807, in place of the Secretary's closure authority. Under the proposed Section 807, the Secretary was to act as an advocate in federal court on behalf of parties aggrieved by the State's failure to provide for the subsistence preference, in specific instances.

Section 807 is meant to provide a mechanism to rectify individual instances of the State's non-compliance

with Title VIII. Previous House versions allowed the Secretary to step in and promulgate a regulation addressing a need in a particular time and place when he determined that the applicable state regulation did not comport with Title VIII. The initial version of Section 807 authorized the Secretary to obtain a court decree on behalf of an aggrieved party that would direct the State to promulgate a new regulation. The Senate Committee Report described the genesis of Section 807 as follows:

> The subsistence management provisions of H.R. 39 as passed by the House of Representatives reflect a delicate balance between the traditional responsibility of the State of Alaska for the regulation of fish and wildlife populations within the State and the responsibility of the Federal government for the attainment of national interest goals, including the protection of the traditional lifestyle and culture of Alaska Natives. Although the committee has adopted a subsistence management system similar in concept to the House approach, after careful consideration the committee has modified the Federal-State relationship in a number of important respects.
>
> *20 Section 704 of the House bill requires the State to develop and implement a subsistence management program which includes a regionalized regulatory system for the management of fish and wildlife on the public lands for subsistence uses, and laws or regulations which provide preference for nonwasteful subsistence uses by local residents consumptive uses of fish and wildlife on the public lands. The State regulations must further provide preference for subsistence uses shall be based upon local residency, customary and direct dependence upon such populations as the mainstay of livelihood and the availability of alternative resources. The committee determined that inclusion of these requirements as part of a federally mandated State program is an unnecessary intrusion into traditional

State responsibility for fish and wildlife management. Consequently, the committee retained both of these requirements in sections 804 and 805 respectively, but has eliminated the requirement that they be included as part of a formal State program.

Section 705(c) of the House bill requires the Secretary to take certain administrative action if he determines that the State has failed to establish a subsistence program or to implement such a program in an manner which adequately satisfies the preference for subsistence uses. While the committee has retained broad Federal guidelines to ensure the adequate implementation of the subsistence preference on the public lands and the Secretary's ongoing responsibility to monitor the States's implementation of such preference, the Committee believe that the responsibility of the Secretary to ensure the protection of subsistence uses and the satisfaction of subsistence needs of Alaska Natives and other rural residents can best be met by providing legal representation for such residents before the United States District Court in appropriate instances in which the Secretary has determined, after consultation with the State, that the State has not timely or adequately provided for the preference for subsistence uses. Although it is the intent of the committee to neither enlarge nor diminish any existing authority of the Secretary to take appropriate administrative action to protect subsistence uses and satisfy subsistence needs of rural residents of Alaska, the committee believes that the responsibilities and authorities of the Secretary and the United States District Court set forth in section 804-807 ensure the protection of subsistence activities and the discharge of Federal responsibilities.

Sen.Rep. No. 95-1300 at 196-7, 95th Cong., 2d Sess. (1973).

While the above quoted legislative history specifically defines the Secretary's function when the State's

regulations fail to comply with Title VIII in specific instances, it does not give the State and Federal regulators any guidance as to their respective roles should the State's entire subsistence program be declared illegal.

The initial version of Section 807 also provided that the Secretary would monitor the State's administration of its program (Section 806), and that the Secretary would establish regional advisory councils if the State failed to do so (Section 805). The Secretary also retained his traditional authority to manage public lands by regulating access and wildlife habitats. ADFG, Vol. 33 at 555, 582-588, 751-753, 775-786, 841, 987-988.

*21 H.R. 39 returned to the House in the 96th Congress and the House Interior Committee issued a report on April 18, 1979, in which it adopted the Senate Committee's version of Title VIII (VII). ADFG, Vol. 34 at 1, 56-66, 145, 239-241. A group of dissenters presented additional views which further demonstrated that the Secretary's duties had been reduced from its original function as sole regulator. Id. at 389, 546-556. The House Merchant Marine Committee issued a report on April 23, 1979, that echoed the Senate Energy and House Interior Committee's conclusions. ADFG, Vol. 35 at 1, 43-49, 161-164.

The House passed this version of ANILCA on May 16, 1979. The Senate Energy Committee issued the final committee report on ANILCA on November 14, 1979. The judicial enforcement provision still required the Secretary to act as an advocate for parties aggrieved by the State's failure to provide for the subsistence preference, in specific instances. ADFG, Vol. 35 at 271, 308-314. This version of ANILCA was passed by the Senate on August 19, 1980, and was referred to the House in November of 1980.

The final amendments to Title VIII were made by Concurrent Resolutions 452 and 453 only days before

ANILCA became law on December 2, 1980. [FN2] Senator Stevens submitted a prepared document as legislative history of the changes, which was printed in the Congressional Record. ADFG, Vol. 39 at 155-158. The amendment to Section 807 eliminated the Secretary's role as advocate in federal court and substituted a private right of action for parties aggrieved by the State's failure to provide for the subsistence preference. Representative Udall submitted the concurrent resolutions in the House. Id. at 499-501. This eleventh-hour revision to Section 807 became law with the passage of ANILCA on December 2, 1980.

FN1. The jointly managed cases, in addition to those captioned above, are *Kluti Kaah Native Village of Copper Center v. State of Alaska,* No. A90-0004-CV, *Fish & Game Fund v. State of Alaska Bd. of Fisheries,* No. A92-0443-CV, *Peratrovich v. United States*, No. A92-0734-CV, *Native Village of Stevens v. McVee,* No. A92-0567-CV, and *Native Village of Quinhagak v. United States,* No. A93-0023-CV.

FN2. 43 U.S.C. ss 1601- 1629a.

FN3. 43 U.S.C. s 1616(d)(2).

FN4. Plainly Congress did not complete its work on the (d)(2) lands issue within the five years Congress originally gave itself to accomplish this chore. When the 95th Congress adjourned in 1978 without adopting an Alaska lands bill, the Secretaries of the Interior and Agriculture exercised withdrawal authority which they possessed under Section 204(b) and (e) of the Federal Land Policy & Management Act to make new withdrawals, thus preserving the availability of land for (d)(2) legislation. The President also withdrew substantial additional acreage by proclamation for addition to national monuments. But for this action, the lands in question would have become available to selection by the State of Alaska under the Statehood Act or Alaska Native groups under ANCSA.

FN5. 16 U.S.C. s 3101, et seq.

FN6. 16 U.S.C. s 3111.

FN7. 16 U.S.C. s 3112.

FN8. ANILCA Section 803, 16 U.S.C. s 3113.

FN9. 16 U.S.C. s 3115(d).

FN10. Ch. 151, Session Laws of Alaska, 1978. Sections (4) and (5) were the main operative provisions of this state act. They were codified as AS16.05.251 and -.255 (1978). There were difficulties with this initial act, for it was adopted by the state legislature before Congress had injected the "rural Alaska resident" concept into the preference afforded for subsistence uses of fish and wildlife into ANILCA. ANILCA Section 803, 16 U.S.C. s 3113. This situation is not relevant to this case, but is described in greater detail in an earlier decision of this court. *Bobby v. State of Alaska,* 718 F.Supp. 764 (D.Alaska 1989).

FN11. 16 U.S.C. s 3116.

FN12. 16 U.S.C. s 3115(c). The Secretary's closure authority is contained in ANILCA Section 816, 16 U.S.C. s 3126. The Secretary's "other" administrative authority is generally taken to have reference to the Secretary's power to manage all other uses of public lands such that appropriate habitat is available for fish and wildlife. ANILCA Section 810, 16 U.S.C. s 3120.

FN13. 16 U.S.C. s 3117(a).

FN14. Clerk's Docket No. 113.

FN15. Under ANILCA, the term "Secretary" means the Secretary of the Department of the Interior except as to National Forest System lands, in which case "Secretary" means the Secretary of the Department of Agriculture. ANILCA s 3102(12); 43 U.S.C. s 1618.

FN16. 16 U.S.C. s 3102.

FN17. 16 U.S.C. s 3113.

FN18. 16 U.S.C. ss 3115(a)-(c) and 3202.

FN19. 16 U.S.C. s 3113.

FN20. 16 U.S.C. s 3115(d).

FN21. 16 U.S.C. s 3113.

FN22. 16 U.S.C. s 3114.

FN23. 16 U.S.C. s 3115.

FN24. 16 U.S.C. s 3126.

FN25. 16 U.S.C. s 3202.

FN26. Title VIII of ANILCA was codified as subchapter II of chapter 51, 16 U.S.C. s 3111, et seq.

FN27. Pub.L. No. 85-508 (72 Stat. 339), effective July 7, 1958.

FN28. 16 U.S.C. s 3202(b).

FN29. The reasonableness test applies to agency action to fill statutory gaps which Congress has implicitly left to the agency. Where there is an explicit legislative delegation to the agency, an arbitrary or capricious test applies. No one contends that this is a case of explicit congressional delegation. Indeed, the State would seemingly not concede that there is any gap in this statute.

FN30. 16 U.S.C. s 3115(d).

FN31. *Chevron*, 467 U.S. at 837 n. 9.

FN32. This legislative history has been compiled and bound in 41 separate volumes, which take up nine feet of shelf space.

FN33. Order re Motions for Summary Judgment on the "Who" Issue, filed November 22, 1993 (Clerk's Docket No. 163).

FN34. 16 U.S.C. s 3115(d).

FN35. 16 U.S.C. s 3124.

FN36. 16 U.S.C. s 3112.

FN37. 16 U.S.C. s 3113.

FN38. ANILCA Section 807(a), 16 U.S.C. s 3117(a), provides for federal court enforcement of a state subsistence program consistent with ANILCA Section 804, 16 U.S.C. s 3114, in federal court. No doubt for purposes of avoiding Tenth Amendment difficulties, Section 807(a) reiterates that state programs are optional with the state, providing for federal court jurisdiction "if the State has fulfilled the requirements of Section 805(d)."

FN39. 16 U.S.C. s 3115(d).

FN40. 16 U.S.C. s 3115(d).

FN41. 16 U.S.C. s 3117(a).

FN42. 55 Fed.Reg. 27,114 (June 29, 1990).

FN43. Clerk's Docket No. 113.

FN44. Clerk's Docket No. 106.

FN45. 16 U.S.C. s 3102. For convenience and ease of reference, 16 U.S.C. s 3102 is hereafter referred to as "Section 102".

FN46. Clerk's Docket No. 48.

FN47. Clerk's Docket Nos. 2, 17, and 121.

FN48. Clerk's Docket Nos. 38 and 124.

FN49. 16 U.S.C. s 3117(a).

FN50. See discussion at pages 7 to 9 hereof for a more complete discussion of what followed the *McDowell* decision.

FN51. ANILCA Section 102, 16 U.S.C. s 3102.

FN52. 16 U.S.C. s 3117(a).

FN53. In the third cause of action, the plaintiffs claim that the federal defendants (through the National Park Service) have precluded the plaintiffs from obtaining reasonable access to Batzulnetas via "the Batzulnetas trail". This issue is not the subject of the pending motions.

FN54. 16 U.S.C. s 3114.

FN55. The final regulation adopted by the Secretary of the Interior reads:

> (b) The regulations contained in subpart D apply on all public lands including all non-navigable waters located on these lands.

57 Fed.Reg. 22,951 (May 29, 1992); *see also* 50 C.F.R. s 100.3(b).

The Secretary of Agriculture adopted identical parallel regulations at 36 C.F.R. s 242.3(b).

FN56. See pages 14 to 16 hereof.

FN57. 16 U.S.C. s 3124.

FN58. The above quoted language is the Secretary's current form of his decision with respect to whether public lands are navigable waterways.

Originally, the Secretary's explanation was as follows:

> There were many comments on the exclusion of navigable waters from the definition of public lands. Some comments regarding the exclusion of State-selected and Native-selected lands in the definition were received

> also. There was a great deal of concern that the exclusion of navigable waters eliminated the majority of subsistence fishing, critical to the well-being of rural communities. Some concerns were expressed also that the sport take of migratory species on State lands affects their numbers for subsistence purposes on public lands.
>
> The United States generally does not hold title to navigable waters and thus navigable waters generally are not included within the definition of public lands. Navigable waters are those waters used or susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.
>
> The scope of these regulation is limited by the definition of public lands in section 102 of ANILCA. Lands validly selected by the State or Native corporations are therefore excluded from this public lands definition.

Temporary Regulation, 55 Fed.Reg. 27,114 at 27,115 (June 29, 1990).

The court perceives no significant difference between the two texts.

FN59. ANILCA Section 801, 16 U.S.C. s 3111.

FN60. ANILCA Section 802, 16 U.S.C. s 3112.

FN61. Congress has the power under the Commerce Clause to regulate waterways that are navigable in fact, *The Daniel Ball,* 77 U.S. 557, 563 (1870); non-navigable tributaries, *United States v. Grand River Dam Authority,* 363 U.S. 229, 232 (1960); waters which were once navigable in fact but are no longer so, *Arizona v. California,* 283 U.S. 423, 453-54 (1931); and waters which may be made navigable by reasonable improvements, *United States v. Appalachian Electric Power,* 311 U.S. 377, 407-409 (1940).

FN62. 16 U.S.C. s 3120.

FN63. ANILCA Section 101(c), 16 U.S.C. s 3101(c), provides:

> It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established,

designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

ANILCA Section 802(1), 16 U.S.C. s 3112(1), provides:

It is hereby declared to be the policy of Congress that--

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes of each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so[.]

Section 802 (s 3112) is quoted in full at pages 4 to 5 hereof.

FN64. See ANILCA Section 805(d), 16 U.S.C. s 3115(d).

FN65. ANILCA Section 801(4), 16 U.S.C. s 3111(4).

FN66. Clerk's Docket No. 113.

FN1. Hereinafter "ADFG, Vol. --- at ---".

FN2. Congressman Udall lodged a detailed discussion of the pending bill in the Congressional Record on November 12, 1980. ADFG, Vol. 39, at 133-151. See discussion of Title VIII, id. at 145-149.

D.Alaska,1994.

John v. U.S.

Appendix B

Affidavit of Petitioner Richard Bishop

No. _____

In The Supreme Court Of The United States

October Term, 1994

Alaska Fish and Wildlife Federation and
Outdoor Council, Inc., et al.
Petitioners
v.
State of Alaska
Respondent
v.
Bruce Babbitt, Secretary of the Interior, et al.
Respondents

AFFIDAVIT OF RICHARD H. BISHOP

1. My name is Richard H. Bishop. I am Executive Director of both Petitioners Alaska Fish & Wildlife Federation and Outdoor Council, Inc. and Alaska Fish & Wildlife Conservation Fund, Inc. I am personally familiar with most aspects of subsistence hunting, fishing, trapping and gathering of natural wildfoods. In 1991-92, I served on former Governor Hickel's Subsistence Advisory Council which developed a proposed state law designed to provide an improved regime to provide for subsistence uses of fish and game. Unless I say otherwise in this affidavit, everything I say is based on my own personal knowledge or observation.

2. My wife Mary L. Bishop and I both gave sworn affidavits in this action in the Ninth Circuit. Rodney M. Arno, Margaret M. Burley, Richard A. Burley, Gary W. Feaster, Albert W. Franzmann, D.V.M., Marcus F. Jensen, Susan L. Kisken, Williams D. Kisken and Robert H. Park-

erson also provided sworn affidavits in the Ninth Circuit as to their interests in this matter. I will refer to all of the individuals who gave affidavits as the individual petitioners. This affidavit summarizes the individual petitioners' affidavits filed in the Ninth Circuit and explains the role and activities of the AOC and the Conservation Fund. Unless I state otherwise in this affidavit, I agree with and adopt the statements made on behalf of the individual petitioners herein.

3. The individual petitioners are all long-time residents of Alaska and subsistence hunters, fishers and natural wildfoods gatherers. All of them currently and historically depend on hunting, trapping and fishing for their predominant or entire supply of meat and fish. As my wife stated in her affidavit below, our family has relied on hunting and fishing for over 90 percent of the meat and fish in our annual family food supply for more than three decades.

4. The individual petitioners believe that the federal regulation at issue in this litigation will prevent them from enjoying the physical, financial, social, cultural and aesthetic benefits of subsistence hunting and fishing guaranteed them by the Alaska Constitution.

5. The individual petitioners believe their health is directly tied to their ability to obtain nutritious, low-fat wildfoods, free of artificial additives and hormones. Their subsistence hunting and fishing directly affects their social and cultural values, and the federal wildlife management regulations at issue in this litigation will prevent them from continuing activities in which they have engaged for decades and in which they would otherwise engage immediately.

6. I personally fish regularly in the Tanana River and expect that once the Tanana River comes under Federal control, my fishing access will be withdrawn. In the past

my access to traditional moose hunting areas has been cut off by other similar Federal regulations. My wife and our family have traditionally hunted moose, waterfowl and small game on federal lands in the Denali National Preserve for the past 19 years. The Burley family harvests their annual food supply from federal areas of the state including the White Mountains National Recreation Area, Arctic National Wildlife Refuge, and Yukon Flats National Wildlife Refuge. The Kiskin family hunts in the Yukon Flats National Wildlife Refuge and the Arctic National Wildlife Refuge and has ranged as far afield as the Selawik National Wildlife Refuge and Koyukuk National Wildlife Refuge. These areas will come under federal control under the Secretary of Interior's regulations.

7. Although we subsist on hunting, fishing and gathering of wildfoods for virtually all of our meat and much of our overall diet, the individual petitioners are not considered rural residents under the current interpretation of Title VIII of ANILCA. Under the federal regulations, we will not be able to hunt, fish or gather wildfoods without restrictions and our opportunities to do so in the areas described above may be completely prohibited.

8. In the mid-1950's, before Alaska became a state, three Alaska conservation organizations (whose histories date back as far as 1915) joined together to form a coalition, then called the Alaska Fish & Wildlife Federation and Sportsmen's Council. The Council, whose purposes included protecting the natural resources treasures of Alaska and promoting the wise use of those resources, included many of the people who shaped Alaska's historic and current policies on fish and wildlife management. Eventually, in 1983, the Council evolved into an umbrella federation of organizations and individuals on whose behalf it is petitioning for intervention.

9. The Alaska Fish and Wildlife Federation and Outdoor Council, Inc. ("AOC"), is an Alaska non-profit corporation, exempt from federal taxation under IRC § 501(c)(4). AOC is a state-wide umbrella organization of approximately 45 member organizations representing approximately 12,000 members; 1,200 persons have joined as individual members of AOC. AOC's purposes include: protection and perpetuation of renewable natural resources, equality in access to and use of these resources; support of professional resource management; and, education, promotion, and participation in regulatory, legislative, judicial and public policy processes affecting these resources. AOC has strongly and successfully supported establishment by state law of numerous wildlife refuges, critical habitat areas, wildlife ranges, public use areas and recreational rivers.

10. The Alaska Fish and Wildlife Conservation Fund ("Conservation Fund") is an Alaska non-profit charitable and educational organization, exempt from federal taxation under IRC § 501(c)(3). The Conservation Fund is made up of approximately 1,200 individual members (who are also members of AOC). The Conservation Fund's purposes include: providing information on fish and wildlife resources, their conservation and related activities; educating the public regarding the American hunting, trapping and fishing heritage; and litigating to protect the rights enshrined in the Alaska Constitution.

11. Since their incorporations, AOC and the Conservation Fund (hereafter in this affidavit, I will refer to both of the organizations and the individual appellants collectively as "AOC") have been involved in six state and federal lawsuits involving federal and state fish and wildlife management policies, including the state and federal *McDowell* cases.

12. AOC has thousands of members, both through organizations and individually, who hunt, fish, trap, and otherwise utilize the wildfood resources of the federal areas which will be affected by the Department of Interior's regulations. Protection of these rights is central to AOC's tax-exempt activities.

13. AOC is well aware that Alaska has managed the fish and wildlife on all lands in Alaska since it became a State in 1960, and we wish that management to continue. From its founding organizations onward, AOC and its members have included the architects of Alaska's wildfood resource management policies. AOC was and is a participant in the *McDowell* and other wildlife protection cases, and is an active proponent of wildfood protection and use in Alaska. When the newly-elected Governor of Alaska announced his intention to withdraw the appeal of the issue of the Secretary's authority to promulgate the regulations at issue in this case, he did so at one of our meetings. We thought he was coming to work out a compromise agreement we could all live with, but instead he simply announced his intentions.

14. AOC opposes the federal regulations which permit the federal government to manage Alaska's fish and wildlife. We fully supported the State of Alaska's lawsuit, *Alaska v. Babbitt*. We were, however, assured that the State would adequately represent our views in this matter, and from what we saw, until the Governor's announcement in January 1995, the State was doing a good job. We did not believe, on the basis of the actual and promised representations, that we needed to intervene in the ongoing *Babbitt* case.

15. When, on January 23, 1995, the Governor of Alaska announced that he would direct the dismissal of the issue of Secretary's authority to administer and manage fish and wildlife on the public lands, AOC was very con-

cerned that we would not be represented in this case. When the Stipulation of Dismissal was signed by the parties and filed with the Ninth Circuit Court of Appeals, we contacted our Representatives and were assured that they were going to take action to intervene. This promise was reinforced by the media coverage of the Legislature's actions. The Legislature did, in fact, try to intervene, and we supported their attempt to do so.

16. Then, on February 8, we learned that the Court had rejected the Legislature's attempts to keep the case alive. We immediately sought qualified counsel to protect our interests. AOC, following a Board of Directors meeting over the weekend, retained counsel experienced in post-judgment interventions on Monday, February 13. Our papers were filed the same day.

I hereby swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

_____/s/_____

Richard H. Bishop

May __, 1995

Appendix C

Certificate Required by Rule 29.1

List of Organizational Members of Alaska Outdoor Council

Certificate Required by Rule 29.1

The following organizations make up the organizational members of the Alaska Outdoors Council:

Alaska Boating Association
Alaska Competitive Shooting Organization
Alaska Falconers Association
Alaska Fish & Wildlife Conservation Fund, Inc.
Alaska Fish & Wildlife Federation and Outdoor Council, Inc.
Alaska Gun Collectors Association
Alaska Rifle Club
Alaska Sportfishing Association
Alaska State Pacific Trapshooting Association
Alaska State Amateur Trapshooting Association
Alaska State Snowmobile Association
Alaska Waterfowl Association
Alaskan Bowhunters Association
Alaskan Marine Dealers Association
Anchorage Rifle & Pistol Club
Chitina Dipnetters
Chugach Range Riders
Clear Sky Sportsmen's Club
Cook Inlet Archers
Cook Inlet Professional Sportfishing
Delta Sportsmen's Association
Fairbanks Practical Pistol Club
Fairbanks Retriever Club
Fairbanks Snow Travelers Association
49th Territorial Guard Regiment
Foundation for North American Wild Sheep: Alaska Chapter
Golden North Archery Association
Interior Alaska Airboat Association
Interior Alaska Gun Dog Association
Interior Alaska Trail Riders Association
Interior Wildlife Association of Alaska

Juneau Rifle & Pistol Club
Kenai River Sportfishing, Inc.
Ketchikan Marine Charters
Ketchikan Sports & Wildlife Club
Ketchikan Volunteer Rescue Squad
Kodiak Island Sportsman's Association
Matanuska Valley Sportsmen
Midnight Sun Flycasters
Ruffed Grouse Society: Interior Alaska Chapter and South Central Chapter
Safari Club International: Alaska Chapter
Safari Club International: Northern Chapter
Slana Alaskans United
Stikine Sportsmen's Association
Tanana Valley Sportsmen's Association
T. V. Sportsmen's Rifle & Pistol Club
Territorial Sportsmen, Inc.
Tok Shooters Association
Tongass Sportfishing Association

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC., *et al.*,
Petitioners,

v.

STATE OF ALASKA,
Respondent,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

LEGISLATURE OF THE STATE OF ALASKA,
Petitioner,

v.

STATE OF ALASKA,
Respondent,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals For the Ninth Circuit

PRIVATE RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The State of Alaska abandoned its interlocutory appeal from a district court holding that the Secretaries of the Interior and Agriculture are authorized by Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3111 *et seq.*, to implement a regulatory program to ensure a priority for subsistence uses of fish and wildlife on federal "public lands" by rural Alaska residents. The Alaska Legislature and a group of private citizens, Alaska Outdoor Council, *et al.*, who were not parties to the case, separately sought, but were denied, leave to intervene in the Court of Appeals for the purpose of reviving and pursuing the State's appeal. The questions presented are:

1. Whether the merits of the underlying claim abandoned by the State are sufficiently colorable to warrant this Court's consideration of the non-party Petitioners' contentions that they have the capacity and standing to sue necessary to intervene and resurrect that claim?

2. Whether Petitioners have the capacity under State law to prosecute a lawsuit asserting Alaska's sovereign interests when the State itself has declined to pursue the suit?

3. Whether Petitioners have established the standing necessary to support intervention for the purpose of reviving the State's withdrawn appeal?

4. Whether the Court of Appeals abused its discretion in denying intervention?

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PRIVATE RESPONDENTS' BRIEF IN OPPOSITION[1]

This is a case about the case that isn't there. In the underlying case below, the State of Alaska, acting through its Governor and Attorney General, had argued in the district court that the Secretaries of the Interior and Agriculture ("the Secretary") had not been empowered by Congress, in the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. 96-487 (Dec. 2, 1980), 94 Stat. 2371, to implement a regulatory regime to assure a statutory priority for rural Alaska residents to engage in subsistence uses of fish and wildlife on federal public lands within the State. Although the State initially took an interlocutory appeal from the district court's adverse resolution of this issue, the State stipulated to a dismissal of its appeal as to that issue prior to oral argument in the Ninth Circuit, and the appeal as to that issue was dismissed with prejudice. The Alaska Legislature, followed by the Alaska Fish and Wildlife Federation and Outdoor Council, Inc., *et al.* ("Outdoor Council" or "AOC"), attempted to intervene in the Ninth Circuit for the purpose of resurrecting the issue, but their efforts were rejected. Both the Outdoor Council (No. 94-1829) and the Legislature (No. 94-1976) seek review of the Ninth Circuit's orders (AOC App. 1a-10a; Leg. App. A-1 through A-5) denying leave to intervene. This case raises no

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[1] Private respondents are the non-governmental parties in two cases which were consolidated for disposition below: *Katie John v. United States*, No. A90-0484-CV (D. Alaska) (HRH), and *Alaska v. Babbitt*, No. A92-0264-CV (D. Alaska) (HRH) (March 30, 1994) (AOC App. 23a; Leg. App. A-12), *rev'd in part*, *Alaska v. Babbitt*, 54 F.3d 549 (9th Cir. 1995) (AOC App. 11a; Leg. App. A-54). Private respondents are the plaintiffs in the *Katie John* case, who are two individual Alaska Natives (Katie John and Doris Charles) and a federally recognized Indian tribe (Mentasta Village Council); and the Alaska Federation of Natives ("AFN"), a statewide Native organization, which was permitted to intervene as a defendant and to file a cross-claim against the federal defendants in the *Alaska v. Babbitt* case. (Prior to consolidation of the cases, AFN also participated in Katie John as *amicus curiae* in support of plaintiffs.)

issue warranting the exercise of this Court's certiorari jurisdiction.[2]

COUNTERSTATEMENT

The Statutory Framework

In the 1980 enactment of ANILCA, Congress undertook two principal comprehensive purposes: (1) to set aside, expand or redesignate vast tracts of the public domain in Alaska as national parks and preserves, national monuments, national wildlife refuges, national forests, national wild and scenic rivers, national wilderness areas, national conservation and recreation areas, and the like, in order to preserve the natural features and resources of those lands and waters for present and future generations; and (2) "to protect the resources related to subsistence needs" and "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." ANILCA §§ 101(a)-(c), 94 Stat. at 2374-75, 16 U.S.C. §§ 3101 (a)-(c). With respect to the latter purpose -- protecting the subsistence way of life of rural residents -- Congress in Title VIII generally impressed all "public lands" in Alaska[3] with a preference for subsistence uses of fish and wildlife over all other uses. §§ 801-816, 94 Stat. at 2422-30, 16 U.S.C. §§ 3111-3126.

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[2] We note that, in contravention of this Court's Rule 12.2, the Outdoor Council has joined its petition for a writ of certiorari (No. 94-1829) with a motion for leave to intervene. Inasmuch as there is (and can be) no case pending in this Court in which to intervene, and no decision of the Ninth Circuit below on the issue of the Secretary's management authority, the Outdoor Council's motion for leave to intervene is senseless.

[3] "Public lands" are defined as "lands, waters, and interests therein, the title to which is in the United States." *Alaska v. Babbitt*, 54 F.3d at 552 (Leg. App. A-59), *citing Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987) (paraphrasing and melding the definition in ANILCA §§ 102(1)-(3), 16 U.S.C. §§ 3102(1)-(3)).

Although it was the primary intent of Congress to protect the subsistence way of life of Alaska Natives, Congress in the end extended the preference to "rural residents" in an attempt to accommodate Alaska's concern that it would not be able under the Alaska Constitution to afford a subsistence-priority right limited to Alaska Natives. *See Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 313 n.1 (9th Cir. 1988) (Kozinski, J.), *cert. denied*, 491 U.S. 905 (1989). Accordingly, in Title VIII of the Act, Congress found that

> in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act [of 1971] and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.

ANILCA § 801(4), 16 U.S.C. § 3111(4).[4] Congress declared its policy to be that "nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of such resources on the public lands of Alaska." § 802(2), 16 U.S.C. § 3112(2). The Act confers a priority for subsistence uses on the "public lands" (§ 804), and defines subsistence uses as the "customary and traditional uses" of fish and wildlife resources by "rural Alaska residents" (§ 803). 16 U.S.C. §§ 3113, 3114.

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[4] Congress determined that the opportunity for continued subsistence uses "is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence" (§ 801(1)), but that the opportunity "is threatened by the increasing population of Alaska" and the "increased accessibility of remote areas containing subsistence resources," among other things (§ 801(3)).

Congress also sought to accommodate Alaska in another way, by enabling the State to have primary regulatory responsibility for assuring the priority for subsistence uses of fish and wildlife by rural residents on the public, as well as State, lands. In § 801(5) of the Act, Congress found that

> the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

16 U.S.C. § 3111(5). Section 805 specifies the "administrative structure" through which Congress sought to ensure this "meaningful role" -- through the primary implementation, depending upon compliance with certain conditions, by either the State or the federal government. 16 U.S.C. § 3115.

Section 805(a) directs the Secretary, one year after ANILCA's enactment, to establish a local and regional participation scheme consisting of at least six subsistence resource regions with a regional advisory council (composed of residents of the region) in each region, and also (if he finds the State's committees to be inadequate) a system of local advisory committees. Subsections 805(a)(3)(A)-(C) provide that the regional councils shall have the authority to review and evaluate "proposals for regulations, policies, management plans and other matters relating to subsistence uses," provide a forum for local viewpoints, and encourage "local and regional participation . . . in the decision making process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses." Subsection 805(a)(3)(D) directs the councils to prepare annual reports to the Secretary identifying

and evaluating subsistence uses and needs, recommending a "strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs," and, finally, making "recommendations concerning policies, standards, guidelines, and regulations to implement the strategy." And § 805(b) directs the Secretary to adequately staff the regional councils and provide them with timely information.

Section 805(c) then mandates that the Secretary shall (absent specified circumstances) implement the regional council recommendations, in the following terms:

> The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands . . . for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

16 U.S.C. § 3115(c).

Subsections 805(a) through (c) thus clearly direct the Secretary to implement a comprehensive subsistence-use management system on the public lands. In addition, § 814 explicitly directs that the Secretary "shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title [VIII]." 16 U.S.C. § 3124. But the State is then given the power to supplant federal management by § 805(d), 16 U.S.C. § 3115(d), which provides:

> The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year of the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses.[5]

Finally, § 807(a), 16 U.S.C. § 3117(a), affords a private right of action in federal court to enforce the subsistence priority against either the State or the Secretary, by providing that subsistence users

> aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 804 (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d)) may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the [federal court] to require such actions to be taken as are necessary to provide for the priority.[6]

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[5] Section 805(e) requires the Secretary to reimburse the State for no more than fifty percent of the annual costs of operating the regional council/local committee system (16 U.S.C. § 3115(e)); these federal payments never exceeded one million dollars in any one year (substantially less than 50% of the State's actual costs).

[6] The section continues by authorizing preliminary injunctive relief in "appropriate" circumstances, and by specifying the scope of final relief that

Congress expressly acknowledged that by the above provisions it has imposed conditions on the State's "traditional" authority to regulate the taking of fish and wildlife on the public domain. Consequently, ANILCA § 1314 states that "[n]othing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in Title VIII*, or to amend the Alaska constitution," nor "to enlarge or diminish" the Secretary's responsibility and authority over management of the public lands "*[e]xcept as specifically provided otherwise by this Act.*" 16 U.S.C. §§ 3202(a) and (b) (emphases added).

The Background Of This Litigation

Beginning prior to the enactment of ANILCA,[7] and continuing until the spring of 1993, every Governor, Attorney General and Legislature of Alaska, every Secretary of the Interior, and every state and federal court to consider the matter, concluded that § 805 of ANILCA requires the Secretary to implement a subsistence-preference management program on the public lands if the State either fails to enact, or if it repeals, State laws of general applicability that conform with the

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may be granted in an action against the State, namely, an order "directing the State to submit regulations which satisfy the requirements of section 804; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue." 16 U.S.C. § 3117(a).

[7] After the House of Representatives had passed an earlier version of ANILCA in 1978, the Alaska Legislature responded by enacting the State's first subsistence-preference law, reprinted in *Bobby v. Alaska*, 718 F. Supp. 764, 788-91 (D. Alaska 1989). The State's 1978 law was modelled on the earlier 1978 House of Representatives' version, which did not prescribe a rural preference. *See Madison v. Alaska Dept. of Fish & Game*, 696 P.2d 168, 176-77 n.13 (Alaska 1985).

requirements of §§ 803-805 of the Act.[8] On May 14, 1982, Secretary Watt wrote Governor Hammond certifying the State's statutory and regulatory program as complying with §§ 803-805, and expressing his determination that "[a]s a result of this certification of compliance, the State retains its traditional role in the regulation of fish and wildlife resources on the public lands in Alaska."[9] When the Alaska Supreme Court thereafter held that the part of the State's regulatory program restricting the State-law subsistence priority to rural residents was inconsistent with the then-extant version of the State statute, *Madison v. Alaska Dept. of Fish & Game*, 696 P.2d 168 (Alaska 1985), the Legislature promptly amended the statute so as to afford the priority to residents of "rural areas," in the hope of complying with ANILCA and retaining State subsistence management authority on the public lands. *See Kenaitze Indian Tribe v. Alaska*, *supra*, 860 F.2d at 314; *Bobby v. Alaska*, 718 F. Supp. 764, 768 (D. Alaska 1989).

Unexpectedly in December of 1989, however, the Alaska Supreme Court held that the Alaska Constitution prohibits the Legislature from providing a priority for subsistence uses that is limited to rural residents. *McDowell v. State*, 785 P.2d 1 (Alaska 1989) (decision stayed until July 1, 1990). The court acknowledged the pre-emptive scope of ANILCA,[10] and that

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[8] Private respondents introduced in the record below extensive documentation of this contemporaneous and consistent interpretation and application of the Act by four different (Republican and Democrat alike) Alaska Governors, Attorneys General and Legislatures, and by three different Interior secretaries, spanning more than a decade. *See* Clerk's Record at Docket No. 133, Exhibits 1-21.

[9] Reprinted in *Bobby v. Alaska*, *supra*, 718 F. Supp. at 812-13.

[10] *See* 785 P.2d at 3 ("ANILCA requires federal management of public lands in Alaska in order to ensure the subsistence priority. However, federal management may be supplanted by the state so long as the state enacts and implements laws `which are consistent with, and which provide

the result of its holding would be the loss of State subsistence-management authority on federal lands and waters. *Id.* at 10 n.20.

In the wake of the *McDowell* decision, the Secretary, effective July 1, 1990, implemented a subsistence management program for the public lands in Alaska. 55 Fed. Reg. 27,114 (June 29, 1990) (temporary subsistence management regulations); 57 Fed. Reg. 22,942 (May 29, 1992) (permanent regulations). That program has been in effect, and the State's authority over uses of fish and wildlife on the public lands correspondingly circumscribed, for over five years. The State made no attempt to enjoin the implementation of that program.[11]

On December 5, 1990, private respondents initiated suit against the Secretary in *Katie John v. United States* (*see* note 1, *supra*), alleging that the federal subsistence program mandated by ANILCA had been unlawfully restricted by excluding from its coverage navigable waters in which the United States owned interests. Over a year later, on February 27, 1992, the State, by its Attorney General, filed its complaint, *Alaska v. Babbitt*, the principal focus of which alleged that the Secretary had asserted subsistence-management jurisdiction over certain navigable

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for the definition, preference, and participation specified in' ANILCA," *quoting* 16 U.S.C. § 3115(d) (footnotes omitted)).

[11] Petitioner Outdoor Council, however, is party to a lawsuit filed in June 1990 alleging that ANILCA's subsistence preference for rural residents violates the United States Constitution. *McDowell v. United States*, No. A92-531-CV (D. Alaska) (HRH) (Oct. 7, 1992) (*McDowell II*), *vacated on other grounds and remanded*, No. 93-35200 (9th Cir. July 25, 1994) (unpublished), 32 F.3d 572 (table). That case is now pending in the district court on remand from the Ninth Circuit to determine whether the plaintiffs have established standing.

and non-navigable waters belonging to the State.[12] The cases were consolidated by the district court.

On March 19, 1993, the State filed a motion for partial summary judgment announcing that its review of ANILCA's voluminous legislative history (including hand-written notes from mark-up sessions) had disclosed congressional intent to continue State subsistence management on the public lands even if the State failed or refused to comply with the conditions of § 805(d). The Secretary's authority, under this newly discovered interpretation of the statute, was said to be limited to protection of the habitat of fish and wildlife on federal lands and waters and to conservation-based closures of the public lands to hunting and fishing, but did not include any authority directly related to the "taking" of such resources (the essential component of "subsistence uses"). The State did not dispute that, even if the State were authorized to manage subsistence hunting and fishing, Title VIII of ANILCA establishes the substantive standards governing subsistence uses on federal lands, *i.e.*, that it pre-empts conflicting State law. But the State suggested that the remedy for subsistence users aggrieved by application of the State's non-complying regulatory subsistence-management regime on federal lands would be case-by-case adjudication in the federal court for the District of Alaska, which assertedly had been empowered to issue injunctions requiring State officials to adopt regulations

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[12] In paragraph 9 of its First Amended Complaint filed on March 5, 1993, the State appeared to concede that if Alaska "fails to enact a subsistence law of general applicability consistent with the subsistence priority established in ANILCA, the Secretary of Interior and Agriculture shall undertake to accord a priority to the opportunity to take fish and wildlife for nonwasteful subsistence uses by rural Alaska residents on `public lands.'" Nonetheless, in Count III the State alleged that the regulations the Secretary had promulgated to implement Title VIII "diminish[]" (in some unspecified way) the State's "authority to manage fish and wildlife on the `public lands' and off the `public lands,' in violation of sections 103(c), 1314(a) and (b) of ANILCA" (¶ 27).

(otherwise unlawful under State law) to implement the federal subsistence program mandated by Title VIII.

The district court initially got bogged down in this "legislative history" argument, but in its final decision on the issue the court upheld the authority of the federal government to implement a subsistence-management program on the "public lands," which the court also construed to encompass all navigable waters in Alaska by virtue of the navigational servitude. AOC App. 23a; Leg. App. A-12. The State took a permissive appeal under 28 U.S.C. § 1292(b) as to both holdings of the district court, and the Secretary appealed from the holding as to the navigational servitude (although, during the pendency of the litigation, the Secretary had changed positions and acknowledged that the federal subsistence program should be extended to encompass those navigable waters in which the United States owns reserved water rights[13]).

Prior to the time of oral argument in the Ninth Circuit, the Governor concluded that the State should abandon its appeal insofar as it concerned the issue of the Secretary's authority to provide for the subsistence priority on public lands. The Attorney General accordingly entered into a stipulation dismissing the appeal of that issue with prejudice.[14] On the eve

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[13] The Ninth Circuit ultimately reversed the district court's holding as to the navigational servitude, but it upheld the determination that federally reserved waters are "public lands" under ANILCA. *Alaska v. Babbitt*, 54 F.3d 549 (9th Cir. 1995) (AOC App. 11a; Leg. App. A-54). The State has petitioned for rehearing on that issue, and the Ninth Circuit's mandate has not issued. Consequently, the federal program has not yet been extended to reserved waters, and the magnitude of that extension has not been determined.

[14] The same Attorney General had previously filed an extensive brief on the issue, as well as a reply brief, and had sought permission from the Ninth Circuit to file a 225-page addendum to the merits brief. The proposed addendum contained snippets of ANILCA's massive legislative history. The Ninth Circuit rejected the request. Order of October 19, 1994.

of and following oral argument, the Legislature, and then the Outdoor Council, sought leave to intervene (and other relief) in the Court of Appeals for the purpose of reviving this issue. (The Legislature sought intervention prior to oral argument, but the Outdoor Council did not seek to intervene until after the case had been argued and was under submission.) The pending petitions in this Court arise from the orders denying appellate intervention.

REASONS WHY THE PETITIONS SHOULD BE DENIED

The underlying claim that petitioners seek to revive is devoid of merit. Even if it had merit, moreover, petitioners have demonstrated neither the capacity nor the standing requisite to its pursuit. They have, in all events, presented no issue, and the record supports none, warranting review by this Court.

I. THE UNDERLYING CLAIM IS MERITLESS

In support of its (now-abandoned) contention in the district court that -- contrary to more than a decade of uniform State and federal practice and judicial construction -- the Secretary was not authorized by Congress to implement the subject federal subsistence management program for public lands in Alaska, the State engaged in a strenuous effort to derive support for its position from the voluminous legislative history of ANILCA. In the end, however, the State succeeded only in demonstrating that "this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366, 374 (1956) (Frankfurter, J.). The State was well-advised to abandon this claim and avoid the further waste of judicial and party resources.

In *New York v. United States*, 112 S. Ct. 2408 (1992), this Court, in discussing the scope of Congress' power under the Commerce Clause, noted that "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 2424. The Court observed that "[t]his arrangement, which has been termed `a program of cooperative federalism,' . . . is replicated in numerous federal statutory schemes," specifically including Title VIII of ANILCA. *Id.*, *citing* Judge Kozinski's opinion in *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989).

In Title VIII of ANILCA, Congress employed familiar features of both federal pre-emption and cooperative federalism. It "direct[ed] the Secretary of the Interior to establish the administrative structure necessary for the implementation of the statute." *Kenaitze Indian Tribe v. Alaska*, 860 F.2d at 313-14, citing §§ 805(a)-(c), 16 U.S.C. §§ 3115(a)-(c).[15] "The federal regulatory scheme is to be stayed, however, if the state of Alaska enacts laws `which are

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[15] As set forth at pages 4-6 *supra*, the express language of § 805(c) and its surrounding context refute the district court's mistaken reading, relied upon heavily by petitioners, "that Congress unintentionally and inadvertently omitted an express provision authorizing the Secretary to implement Section 804 in the absence of a state program." AOC App. at 36a; *see also id.* at 33a (§ 805(c) "says not a word about implementing the subsistence preference for rural Alaskans created by Section 803 or the subsistence priority created by Section 804").

While § 805(c) does not actually *cite* §§ 803 and 804, it plainly "says a word" about them when it directs the Secretary to follow the comprehensive subsistence-management recommendations of rural regional councils (composed of rural residents) "*concerning the taking of fish and wildlife on the public lands . . . for subsistence uses*" (emphasis added). 16 U.S.C. § 3115(c). Compare the language of § 804, which mandates a priority for "the taking on the public lands of fish and wildlife for nonwasteful subsistence uses." 16 U.S.C. § 3114.

consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115 of this title.'" 860 F.2d at 314, *citing* § 805(d), 16 U.S.C. § 3115(d). Congress thus gave Alaska "the choice between federal regulation or self-regulation with federal oversight." *Id.*

Every other court, federal and State, that has looked at Title VIII has reached this same conclusion as to its plain meaning. *See, e.g., Native Village of Quinhagak v. United States*, 35 F.3d 388, 390 (9th Cir. 1994) ("Alaska's noncompliance with ANILCA made the federal government responsible"); *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) (ANILCA "leaves implementation to the Secretary of the Interior," but it "also contains an opt-in clause for the state of Alaska"); *McDowell v. United States*, No. A92-531 Civil, slip op. at 3-4, 10, 19-26 (D. Alaska Oct. 7, 1992) (*McDowell II*), *vacated on other grounds and remanded*, No. 93-35200 (9th Cir. July 25, 1994) (unpublished); *Kluti Kaah Native Village of Copper Center v. Alaska*, No. A90-004-CV (D. Alaska Aug. 15, 1990); *Bobby v. Alaska*, 718 F. Supp. 764, 766-68 (D. Alaska 1989); *McDowell v. State*, 785 P.2d 1, 3 (Alaska 1989); *Totemoff v. State*, 866 P.2d 913 (Alaska App. 1993), *appeal pending*, No. S-6151 (Alaska)

As Judge Kozinski quite accurately described the scope of the statutory scheme in *Kenaitze Indian Tribe v. Alaska*, *supra*:

> The statute only provides that if the state wishes to regulate in a manner consistent with federal law, *federal regulation will be withheld.* ANILCA does not assign any particular functions to the state as, indeed, it could not. As a separate sovereign, the state is at all times free to refuse to regulate; Congress could not compel it to do so. If the state refuses, *the Department of the Interior will step in and do the job.* The state's role is thus more accurately characterized as supplanting the federal regulatory scheme, rather than implementing it.

860 F.2d at 316 (emphases added).[16] There, too, the State had argued that "ANILCA's legislative history . . . overcomes all other considerations. But legislative history is not a panacea; it cannot overcome the structural and semantic problems discussed above." *Id.* at 318.

The case that petitioners would have this Court resurrect, therefore, would simply have to be interred anew -- even if petitioners had the capacity and the standing to resurrect it. We show, however, that they do not.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT THE ALASKA STATE LEGISLATURE LACKS CAPACITY TO SUE UNDER STATE LAW AND HENCE IS NOT EMPOWERED TO INTERVENE IN THIS ACTION; NEITHER THE LEGISLATURE NOR AOC HAS ESTABLISHED EITHER STANDING OR A RIGHT TO INTERVENE

A. The Alaska Legislature Lacks Capacity to Sue

Although the Legislature variously disguises its petition as raising federal issues of standing or intervention, its real complaint is that the Alaska Governor, through his Attorney General, and not the Legislature, has the right to control litigation brought in the name of the State of Alaska. Indeed, the Legislature is here precisely because the Governor and the

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[16] The court underscored this holding when the State, in its petition for rehearing, argued that the federal Constitution's Guarantee Clause and Tenth Amendment "preclude a federal court from directing a state to amend its laws to make them consistent with ANILCA." 860 F.2d at 318 n.8. The court rejected the argument as irrelevant: "We do not purport to be directing the state to amend its laws; it is free to eschew any further entanglement with the federal government by advising the Department of the Interior that it is withdrawing from its role in administering ANILCA." *Id.*

Attorney General below elected not to pursue what they determined to be a meritless claim. The capacity of the Alaska Legislature to sue on behalf of the State is a quintessential *state law* issue, raising no federal issue worthy of certiorari under this Court's Rule 10.1(a).

The core issue here is one of capacity to sue. Under Rule 17(b) of the Federal Rules of Civil Procedure, the "capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . . ." The law of the State of Alaska, as expressed through its constitution, statutes and common law, vests exclusive authority in the Executive -- the governor and his attorney general -- to bring legal actions in the name of the State.[17] Since Alaska law vests exclusive authority in the Executive to bring such actions, the Legislature lacks the capacity to sue in the name of the State.

This much is clear from the seminal Alaska case on separation of powers, *Public Defender Agency v. Superior*

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[17] Article III, section 1 of the Alaska Constitution expressly vests the executive power of the State in the Governor. Article III, section 16 makes the Governor "responsible for the faithful execution of the laws" and authorizes him exclusively to litigate in the name of the State. To implement sections 1 and 16 of Article III, Alaska Stat. § 44.23.020 charges the Attorney General with the exclusive authority to represent the State and its citizens in all civil actions.

Court, 534 P.2d 947 (Alaska 1975).[18] In *Public Defender*, the Alaska Supreme Court emphasized that the Attorney General:

> is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best . . . . This discretion over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.

Id. at 950 (citations and footnotes omitted). For a coordinate branch of government to interfere with the Executive's prerogatives in litigation is to violate the Alaska Constitution's separation of powers. Thus, "the Attorney General cannot be controlled in either his decision of whether to proceed, or in his

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[18] The separation of powers doctrine has been applied by the Alaska Supreme Court in other contexts to limit the Legislature's authority. For instance, in *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976), the Legislature and the presiding officers of each house brought an action against the governor to confirm the constitutionality of a statute requiring legislative confirmation of certain executive branch appointees. The Alaska Supreme Court found the statute unconstitutional, concluding that the Legislature's confirmation power is limited to those officials for whom the constitution requires confirmation. It ruled that the appointment of Executive Branch officers is an executive function, "for without such a power, the responsibility for executing executive duties would be diffused and the goal of separation of branches of government, avoiding too great a concentration of power in one branch, would be defeated." To hold in favor of the Legislature, the court said,

> would emasculate the restraints engendered by the doctrine of separation of powers and result in potentially serious encroachments upon the Executive by the Legislative Branch, because there would be no logical termination point to the Legislature's confirmation of executive appointments.

Id. at 8 (footnote omitted).

disposition of the proceeding." *Id.* In short, as a matter of Alaska law, the Legislature lacks the capacity to pursue an action that has been abandoned by the Executive.[19]

The Petitioner argues that the Ninth Circuit's holding "impermissibly enlarge[s]" the Article III and Fed. R. Civ. P. 24 requirements for intervention in direct conflict with this Court's precedent and that of other circuits. Leg. Pet. at 17. Petitioner misconstrues each of the cases relied on, for none address whether as a matter of state law a legislature can intervene to litigate a state's sovereign interests against the federal government when the state executive has determined not to do so.[20] In no case cited by Petitioners, nor of which we are aware, has a federal court ignored or overridden a state law

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[19] Contrary to Petitioner's claims (Leg. Pet at 20 n.32), the establishment of a legislative council empowered to "do all things necessary to carry out legislative directives and law," cannot overcome the constitutional infirmity that the Legislature possesses only such authority as is granted to it under the Alaska Constitution. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 135 (1976) ("Congress could not, merely because it concluded that such a measure was 'necessary and proper' to the discharge of its substantive legislative authority, . . . vest in itself, or in its officers, the authority to appoint officers of the United States" any more than it could "pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I"). Nor can the mere adoption of a resolution by both Houses grant to the Legislature that which the constitution forbids.

[20] Petitioner confuses Article III standing with state law capacity to bring suit. In none of the circuit cases cited by Petitioner was there a state law challenge to the plaintiff's power to bring the litigation. Rather, the challenges were to the plaintiff's Article III standing and/or Fed. R. Civ. P. 24 requisites. And in the two cited Supreme Court cases where a state law challenge was raised, the issue was not rejected out of hand (as the Petitioner suggests), but was carefully considered. Only where *state law* was found to permit intervention was intervention upheld. *See Karcher v. May*, 484 U.S. 72 (1987); *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972).

prohibition against litigation by a state legislative branch of government where such authority is vested in the executive.

B. Alaska Outdoor Council (AOC) Lacks Capacity to Sue

Through its petition, the AOC Petitioners (private citizens) seek intervention to carry forward the State's challenge to the federal assertion of subsistence management authority over the public lands. Before abandoning its challenge below, the State had argued that ANILCA does not expressly confer such management authority on the Secretary, leaving such authority in the State, despite the incompatibility of its regulatory regime with federal law. By attempting to resurrect these arguments, AOC attempts to press claims aimed at protecting the State's sovereign interests. In doing so, AOC runs up against the same disability as the Legislature, in that AOC also lacks capacity to sue in the State's stead as a matter of state law.

As discussed above, Alaska law vests exclusive authority in the executive to bring actions in the name of the State. Thus, AOC, as a third party, must rest its right to intervene on some state statutory authority granting private individuals the right to represent the State in actions to enforce state interests.[21] But AOC cannot point to such statutory authority because none exists. Alaska has passed no legislation authorizing a private person to represent the interests of the State as a private attorney general in a matter such as this. Absent such authorization, AOC lacks capacity to sue on the State's behalf.[22] *Mountain States Legal Foundation v. Costle*,

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[21] As a matter of federal law it is well established that a third party ordinarily does not have standing to raise the constitutional rights of another person who is not a party to or joined in the suit. *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979).

[22] *See* footnote 11, *supra.*

630 F.2d 754 (1980) (individuals, including state legislators lack standing to raise claims which properly belong to the State).

C. Petitioners AOC And the Alaska Legislature Lack Article III Standing

The Petitioners' lack of capacity to sue undermines their claims to standing and a right of intervention. With respect to Article III standing, the Legislature lacks standing because its legislative powers are not at issue in the underlying claim.[23] Although the merits are not before this Court, the State's original suit contended that the Secretary is not empowered by Congress under Title VIII to regulate subsistence on federal lands, but instead that Congress empowered the federal judiciary alone to enforce Title VIII. Prior to abandoning this claim, the State below never challenged Congress's authority to legislate in this field, just the proper mechanism for implementing supreme federal law.[24] Thus, within the framework of this case it matters not to the State Legislature what branch of the federal government regulates subsistence on public lands; it suffices that Congress has occupied and pre-empted the field. No matter the outcome of the Attorney

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[23] If the Legislature's argument were followed to its logical conclusion, every time the Congress passed a law which pre-empted a field, thereby precluding State legislation in an area, the legislatures of all fifty states would possess Article III standing to challenge it. That is untenable. In such circumstances the legislatures would have nothing more than a generalized grievance about the conduct of government, not a claim founded on injury to the legislature by distortion of the process by which a bill becomes law. *Moore v. U.S. House of Representatives*, 733 F.2d 926 (D.C. Cir. 1984).

[24] Indeed, the State has never disputed the authority of Congress to impose a rural priority for subsistence uses on the public lands, and neither has it contested federal authority to compel State compliance with the priority on the federal public lands.

General's now-abandoned claim, the State Legislature would have no greater or lesser power to legislate. It is for this reason that the Legislature suffered no injury in fact when the Attorney General abandoned his ill-conceived attack on the Secretary's regulatory authority.[25]

As for Petitioner AOC, it has failed to establish the requirements for third-party standing. Standing usually requires a party to assert an injury personal to itself, not an injury to a third party. *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984). As shown above, the claims AOC wants to advance are claims of a third party -- the State of Alaska -- and not AOC's claims. In that situation, *Powers v. Ohio*, 111 S. Ct. 1364 (1991), teaches that a litigant must meet certain requirements:

> the litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in

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[25] Petitioner relies heavily on *Coleman v. Miller*, 307 U.S. 433 (1939); *Karcher v. May*, 484 U.S. 72 (1987); *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1984), *vacated as moot*, *Burke v. Barnes*, 479 U.S. 361 (1987); and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. 1974). These cases are inapposite. Here, the Legislature is not acting to defend the constitutionality of one of its enactments for none is at issue. Further, these cases involved a distortion of the legislative process -- the right of the Legislature to participate and to have its votes given effect. Here there was no similar nullification of a vote or distortion of the process. The Alaska Legislature's right to participate and have its vote counted has in no way been interfered with. *Cf. Chiles v. Thornburgh*, 865 F.2d 1197, 1206-07 (11th Cir. 1989). Moreover, the Legislature's claim of five years of interference with its ability to legislate is belied by its own actions. The challenged regulations have been in effect since the federal takeover following *McDowell v. State*, 785 P.2d 1 (Alaska 1989). The existence and implementation of those regulations did not prevent the Legislature from completely revamping its subsistence law in 1992. *See* Alaska Stat. § 16.05.258, *et. seq.*, Ch. 1 Second Special Session Laws of Alaska 1992.

> dispute"; the litigant must have a close relationship to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Id. at 1370-71 (citations omitted.) AOC fails on all three grounds. AOC's claimed injury to the right of its members to hunt (AOC Pet. at 10) is entirely speculative; there is no causal connection between the alleged injury and the activity complained of (*i.e.*, Secretarial regulation). As discussed above, the claim abandoned below was concerned strictly with *who* -- the State or the federal government -- regulates subsistence hunting and fishing on public lands. Although AOC may have a generalized grievance about who regulates public lands and an abstract desire to force compliance with its view of the law, that in itself is insufficient to show a particularized injury in fact. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2143-45 (1992).

AOC also lacks a "close relationship" with the State, and certainly cannot show that the State is unable to protect its interests. The lack of a "close relationship" with the State is evidenced by the fact that the State no longer agrees with the position it abandoned and that AOC now seeks to pursue. AOC's mere disagreement with the State hardly establishes the State's inability to ably represent its own interests; rather, the State has simply chosen to abandon an ill-conceived claim. *Cf. Diamond v. Charles*, 476 U.S. 54, 62-63 (1986) (standing to represent alleged interest of a state denied when the state did not itself seek judicial review of the lower court decision).

In sum, since AOC is asserting the claims of a third party but has failed to establish the requirements for third-party standing, AOC lacks standing to litigate the abandoned claims on behalf of the State.

D. The Ninth Circuit Did Not Abuse Its Discretion In Denying Petitioner's Request For Intervention Under Fed. R. Civ. P. 24

The Petitioners' lack of standing precludes them from establishing intervention as of right under Fed. R. Civ. P. 24(a)(2).[26] "An intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Article III." *Diamond v. Charles*, *supra* at 68; *Don't Bankrupt Washington Committee v. Continental Bank*, 460 U.S. 1077 (1983) (denying a public interest organization "standing to bring this appeal" where the state government declined to seek review of a lower court decision invalidating a state statute).

Petitioners' lack of standing also precludes permissive intervention under Fed. R. Civ. P 24(b). Since jurisdiction must be grounded on Article III standing, *Valley Forge College* v. *Americans United*, 454 U.S. 464, 476 n.13 (1982), the Ninth Circuit did not abuse its discretion in denying intervention. *Warth v. Seldin*, 422 U.S. 490 (1975) (court within its discretion to deny intervention where standing is lacking).

CONCLUSION

For these reasons, the Petitions for Writs of Certiorari should be denied.

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[26] Even if standing were not a complete bar to Petitioners' intervention, Petitioners have not established the requisite criteria for intervention as of right. Neither Petitioner can lawfully claim an interest in the subject transaction, for they lack the capacity and their claimed injuries are speculative at best. Second, since they have no right to protect the claimed interests, there is nothing to impair or impede. Third, any interest they might have in the effect of federal regulation on the State and its citizens is well represented by the State.

Respectfully Submitted,

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Nos. 94-1829 and 94-1976

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

ALASKA FISH AND WILDLIFE FEDERATION AND OUTDOOR COUNCIL, INC., ET AL., PETITIONERS

v.

STATE OF ALASKA, ET AL.

ALASKA STATE LEGISLATURE, PETITIONER

v.

STATE OF ALASKA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The State of Alaska dismissed its interlocutory appeal of the district court's ruling that the Secretaries of Agriculture and the Interior have authority to administer provisions of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3101 *et seq.* The question presented is whether the court of appeals properly denied petitioners' subsequent motions to intervene for the purpose of pursuing an appeal.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals denying petitioners' motions to intervene and dismissing the interlocutory appeal on the issue of the Secretary's authority to administer the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3101 *et seq.* (94-1829 Pet. App. 3a-10a; 94-1976 Pet. App. A1-A4)

are unreported. The subsequent opinion of the court of appeals, addressing the issue of the definition of "public lands" under ANILCA (94-1829 Pet. App. 11a-22a), is reported at 54 F.3d 549. The order of the district court certifying both issues for interlocutory appeal (94-1976 Pet. App. A6-A11) is unreported. The opinion of the district court (94-1829 Pet. App. 23a-65a; 94-1976 Pet. App. A12-A53) is unreported.

JURISDICTION

The court of appeals denied petitioners' motions to intervene on February 7, 1995 and February 23, 1995. Petitions for rehearing were denied on March 7, 1995 and March 22, 1995. 94-1829 Pet. App. 1a-2a; 94-1976 Pet. App. A5. The petitions for a writ of certiorari were filed on May 5, 1995 and June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Alaska National Interest Lands Conservation Act (ANILCA or the Act), Pub. L. No. 96-487, 94 Stat. 2371, 16 U.S.C. 3101 *et seq.*, regulates the use of "certain lands and waters in the State of Alaska" that contain nationally significant natural, cultural, recreational, and wildlife values, among others. See 16 U.S.C. 3101(a). One of Congress's purposes in ANILCA was "to provide the opportunity for rural residents [of Alaska] engaged in a subsistence way of life to continue to do so." 16 U.S.C. 3101(c). The Act declares it to be congressional policy "to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of [public] lands." 16 U.S.C. 3112(1). To that end, the Act establishes a priority for "the taking on public

lands of fish and wildlife for nonwasteful subsistence uses * * * over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114.

ANILCA defines "subsistence uses" as "the customary and traditional uses by rural Alaska residents of wild, renewable resources." 16 U.S.C. 3113. It also defines "public lands" to be (with certain exceptions) lands situated within Alaska that are "Federal lands." 16 U.S.C. 3102(3). "Federal land," in turn, is defined to mean "lands the title to which is in the United States" (16 U.S.C. 3102(2)), and "land" is defined to mean "lands, waters, and interests therein" (16 U.S.C. 3102(1)).

Title VIII of ANILCA authorizes the Secretary of the Interior[1] to "prescribe such regulations as are necessary and appropriate to carry out his responsibilities" under the Act. 16 U.S.C. 3124. Title VIII also directs the Secretary to establish regional advisory councils to review and evaluate proposals for the subsistence use of fish and wildlife. 16 U.S.C. 3115(a). The Secretary must consider the reports and recommendations of the regional advisory councils when exercising his "administrative authority over the public lands," 16 U.S.C. 3115(c), but he need not follow the recommendation of a regional advisory council if he determines that the recommendation "would be detrimental to the satisfaction of subsistence needs." *Ibid.*

In recognition of the State of Alaska's traditional exercise of authority over the public lands in the

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[1] The Secretary of the Interior has principal responsibility for administering the public lands governed by ANILCA, but the Secretary of Agriculture has authority for the lands within the National Forest System. 16 U.S.C. 3102(12).

State, Title VIII permits the establishment of an alternative state regulatory structure to protect subsistence use of public lands by rural Alaska residents. The Act provides that, if within one year of its enactment, the State of Alaska "enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in" ANILCA for rural Alaska residents, then the Secretary shall not implement the sections of ANILCA directing the establishment of regional advisory councils. 16 U.S.C. 3115(d). Instead, the state laws, "unless and until repealed, shall supersede such sections [of ANILCA] insofar as such sections govern State responsibility * * * for the taking of fish and wildlife on the public lands for subsistence uses." *Ibid.*; see *Kenaitze Indian Tribe* v. *Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), cert. denied, 491 U.S. 905 (1989).

When ANILCA was enacted, both the State of Alaska and the federal government anticipated that the preference for subsistence uses of public lands by rural residents would be administered by the State, pursuant to a state regulatory scheme. In fact, at the time of ANILCA's enactment, Alaska had already adopted a statute conforming generally to ANILCA's requirements for management of subsistence uses of fish and wildlife, including a priority for nonwasteful subsistence use of wild, renewable resources. However, under the state statute, eligibility for the priority was not limited, as required by ANILCA, to rural Alaska residents. The State therefore promulgated regulations limiting eligibility for the priority to rural residents. After review and approval of the state regulatory scheme by the Secretaries of

Agriculture and the Interior, the State became responsible for regulation of subsistence use of wild renewable resources on May 14, 1982. See *Kenaitze*, 860 F.2d at 314.

In 1985, the Alaska Supreme Court invalidated the State's regulations governing eligibility for subsistence fishing as inconsistent with the governing state statute. *Madison* v. *Alaska Dep't of Fish & Game*, 696 P.2d 168. Without those eligibility regulations, the State's subsistence priority fell out of compliance with ANILCA, and the Secretary of the Interior withdrew certification of the State's regulatory scheme, pending enactment of new subsistence legislation consistent with ANILCA. *Kenaitze*, 860 F.2d at 314. The State then enacted legislation to remedy the inconsistency between its subsistence statute and ANILCA, and the Secretary of the Interior certified that Alaska's subsistence use legislation was again in compliance with ANILCA. *Ibid.* In 1989, however, the Alaska Supreme Court ruled that the amended subsistence statute violated Article VIII of the Alaska Constitution, which (it held) prohibits the State from according a preference for the use of natural resources on the basis of residency. *McDowell* v. *Alaska*, 785 P.2d 1, 6-9. Because ANILCA expressly reserves the priority for subsistence use on public lands to rural Alaska residents, the State was unable to exercise its authority under the Act, and the Secretary took over implementation of ANILCA's preference. See 55 Fed. Reg. 27,114 (1990).

2. On June 29, 1990, the Departments of Agriculture and the Interior jointly published temporary regulations governing subsistence uses of the public lands in Alaska. 55 Fed. Reg. 27,114. The regulations

provided that the priority for subsistence use on "public lands" did not apply to navigable waters. The agencies noted that "[t]he United States generally does not hold title to navigable waters and thus navigable waters generally are not included within the definition of public lands." *Id.* at 27,115; see *id.* at 27,118. The final regulations, which made no relevant change in the interpretation of the scope of federal authority (see 57 Fed. Reg. 22,942 (1992)), provided that the priority for subsistence use was limited to "all public lands including all non-navigable waters located on these lands." 50 C.F.R. 100.3(b).

On December 5, 1990, a group of Native Alaskans filed suit against the United States in the United States District Court for the District of Alaska, challenging the exclusion of navigable waters from the federal subsistence regulations. *Katie John* v. *United States*, No. CV-90-484. The *Katie John* plaintiffs conduct subsistence fishing at Batzulnetas, Alaska, within Wrangell-St. Elias National Park and near the confluence of Tanada Creek and the Copper River, which are navigable waters. The plaintiffs sought extension of the priority for subsistence fishing for rural Alaskans to those waters. See 94-1976 Pet. App. A31-A32.

On February 27, 1992, the State of Alaska brought a separate action in district court, challenging the federal government's authority to manage subsistence uses of fish and game at all under Title VIII of ANILCA. *Alaska* v. *United States*, No. CV-92-264. The State contended that the federal subsistence regulations impermissibly diminished the State's authority to manage fish and wildlife, and it argued that, under ANILCA, the State retained authority over fish and wildlife on public lands, even though it

had no enforceable law respecting the statutorily mandated priority for rural Alaskans' subsistence use.

The district court consolidated the State's challenge with the *Katie John* litigation. On March 30, 1994, it ruled that the federal government had authority under Title VIII of ANILCA to assume administration of the subsistence priority, after the Alaska Supreme Court invalidated the State's subsistence law. 94-1976 Pet. App. A21-A30. In the same opinion, the court also concluded that the Secretary had erroneously construed federal "public lands," as that term is used in ANILCA, to exclude navigable waters; it held that the statutory term (and therefore the federal priority for subsistence use) covers all navigable waters in Alaska. *Id.* at A46, A48. The district court therefore granted the *Katie John* plaintiffs' motion for partial summary judgment and denied the dispositive motions filed by the State and the federal government. *Id.* at A48.

The district court certified its order granting partial summary judgment for interlocutory review by the Ninth Circuit under 28 U.S.C. 1292(b). 94-1976 Pet. App. A6-A11. On April 14, 1994, the State of Alaska filed a petition for interlocutory appeal with the Ninth Circuit, seeking permission to appeal on both issues resolved by the district court. On May 19, 1994, the Ninth Circuit granted permission to appeal, and briefs were filed addressing both issues.

On January 23, 1995, the Governor of Alaska announced that he intended to direct the dismissal of the State's appeal of the district court's conclusion that the federal government had authority to implement ANILCA. The State subsequently dismissed its interlocutory appeal on that issue by

stipulation with all parties. On January 25, 1995, a resolution was introduced in both Houses of the Alaska Legislature (94-1976 Pet. App. A70-A73), urging the Governor not to dismiss the appeal on the question of the federal government's authority, and resolving, if the Governor dismissed the appeal, to "intervene as a representative of the citizens of the State of Alaska to continue the lawsuit and advocate the position that the Secretary of the Interior and the Secretary of Agriculture do not have the authority to assume management of fish and wildlife on public land in the State of Alaska." *Id.* at A72. That resolution was passed by the Alaska Senate on January 26, 1995, and by the Alaska House of Representatives on January 30, 1995.

On January 27, 1995, the Legislature of the State of Alaska filed in the Ninth Circuit an emergency motion to intervene, or in the alternative, for substitution or for stay of the dismissal of the State's appeal. On February 7, 1995, after receiving letter briefs, the court of appeals denied the Legislature's motion, stating that "we conclude the Alaska State Legislature is not empowered under state law to intervene in this appeal." 94-1976 Pet. App. A1. The court also ordered the dismissal, from the interlocutory appeal, of the issue "whether ANILCA authorizes the Secretary to manage the subsistence priority in the absence of consistent Alaska laws." *Id.* at A4.

On February 15, 1995, the Alaska Fish and Wildlife Federation and Outdoor Council (AOC) moved to intervene for the purpose of continuing the appeal on the issue of the federal government's authority under ANILCA. AOC claimed to represent the interests of non-rural subsistence users of wild renewable

resources in Alaska who fear that federal implementation of the Title VIII priority will interfere with their ability to use subsistence resources. See 94-1829 Pet. App. 69a. The court of appeals denied AOC's motion in an order issued on February 23, 1995. *Id.* at 4a.

On April 20, 1995, the court of appeals reversed the district court's grant of summary judgment to the *Katie John* plaintiffs, and concluded that the term "public lands," within the meaning of ANILCA, includes only "those navigable waters in which the federal government has an interest under the reserved water rights doctrine." 94-1976 Pet. App. A58. The court rejected both the State's contention that the term excludes all navigable waters, and the *Katie John* plaintiffs' contention that it includes all navigable waters. *Ibid.* A petition for rehearing filed by the State of Alaska was denied on August 8, 1995.

ARGUMENT

The court of appeals denied petitioners' motions to intervene in a series of unpublished summary orders, which do not establish binding circuit precedent. Moreover, the court's resolution of the issue of intervention is correct, and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. a. The Legislature of Alaska attempted to intervene in this case after the only existing party with standing to appeal the district court's decision on the issue of federal authority, the State of Alaska, dismissed its appeal. To continue the appeal in the absence of the State, the Legislature itself must satisfy the requirements of Article III. See *Diamond* v. *Charles*, 476 U.S. 54, 69 (1986). In this case, the

Legislature has not satisfied one of the "irreducible constitutional minimum" requirements of Article III, that it demonstrate injury to a "legally protected interest." See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The State of Alaska, as a whole, may have a "legally protected interest," sufficient to satisfy Article III, in its authority to regulate public lands in Alaska under ANILCA. See *Diamond*, 476 U.S. at 65. The court of appeals in effect concluded, however, that the State, as represented by its executive branch, was the only entity authorized by state law to defend that interest in the courts, for it denied intervention to the Legislature on the ground that "the Alaska State Legislature is not empowered under state law to intervene in this appeal." 94-1976 Pet. App. A4. Accord *Mountain States Legal Found.* v. *Costle*, 630 F.2d 754, 771 (10th Cir. 1980) (holding that "the *only* party with the requisite 'standing' * * * is the State of Colorado, represented here solely by the Colorado Attorney General by virtue of statutory and executive authority"), cert. denied, 450 U.S. 1050 (1981). The court's interpretation of Alaska law was in accord with "[t]he general rule * * * that, by virtue of constitutional and/or statutory provisions or common-law power, the state attorney general * * * is the exclusive legal representative of the state in all litigation * * * and he alone has the right to represent the state as to litigation involving a subject matter of statewide interest." 630 F.2d at 771. The Legislature points to no contrary authority establishing that it has a right to sue, under Alaska law, to defend the interests of the State as a whole.

The Legislature contends (94-1976 Pet. 8) that authorization of a governmental entity to sue under

state law is irrelevant to the question of Article III standing. That contention is inconsistent with *Karcher* v. *May*, 484 U.S. 72 (1987). In *Karcher*, the Court held that the former Speaker of the New Jersey General Assembly and former President of the New Jersey Senate, who had been authorized by the New Jersey Legislature to intervene in a lawsuit as representatives of their respective Houses to defend the constitutionality of a state statute, no longer had Article III standing after they left their leadership posts and their successors withdrew the appeal on behalf of the Legislature. *Id.* at 77-81. The Court noted that "[t]he authority to pursue the lawsuit on behalf of the legislature belongs to those who succeeded [Speaker] Karcher and [Senate President] Orechio in office." *Id.* at 77. Although Karcher and Orechio originally had Article III standing to represent the State's interests because they were authorized by state law to do so, they lost that standing once they lost their state-law authority to represent the interests of the State of New Jersey.

The Court did not hold in *Karcher* that a state legislature always has a protected legal interest in defending the constitutionality of legislation that it has passed, as the Legislature suggests (94-1976 Pet. 12). In *Karcher*, the Court noted that, under New Jersey law, as authoritatively construed by the New Jersey Supreme Court, the presiding officers of the New Jersey Legislature "had authority * * * to represent the State's interests" in court. 484 U.S. at 82. The Court therefore accepted that Karcher and Orechio had standing to represent the State's interests in the court of appeals while they still held their leadership positions, although not thereafter. But the Court did not announce a general rule that a

state legislature always has standing to defend the constitutionality of laws that it has enacted, or any other interest of the State as a whole in its authority to legislate and regulate.

b. Because the Legislature of Alaska is not authorized by state law to represent the interests of the State in this litigation, the Legislature has standing only if it has some other, distinct interest that would be affected by the case. The Legislature did not rely on any other interest, however, when it resolved to intervene in the lawsuit. The Legislature stated only that it intended to "defend[] the right of the State of Alaska to govern the management of fish and wildlife on public land in its territory." 94-1976 Pet. App. A72. That "right" is the interest of the State as a whole, the defense of which is vested by state law in the executive branch of the state government of Alaska. Because the Legislature asserted no other interest in the case, it has no standing to sue. Cf. *Karcher*, 484 U.S. at 78 (noting that "Karcher and Orechio's intervention as presiding legislative officers does not entitle them to appeal in their other individual and professional capacities").

The Legislature relies on "legislative standing" cases in which the courts have permitted state and federal legislative bodies and individual legislators to represent the interest of the legislature (94-1976 Pet. 11-12, 19-20). In those cases, however, the legislators were not seeking to represent the interest of the State or of the United States as a whole, but were attempting to protect the legislature's separate interest in a specific role in the lawmaking or governing process against encroachment by another branch of government. In *Coleman* v. *Miller*, 307 U.S. 433 (1939), for example, the Court concluded that

Kansas State Senators who had voted against adoption of a constitutional amendment had standing to challenge the vote of the Lieutenant Governor, who cast the deciding vote for adoption of the amendment. The interest represented by the state legislators was not the role of Kansas, as a State, in the amendment process, but the legislators' distinct "interest in maintaining the effectiveness of their votes" in that process under the Constitution against invasion by another state actor. *Id.* at 438. In *INS* v. *Chadha*, 462 U.S. 919 (1983), the Court observed that the United States House of Representatives and Senate had intervened in the litigation to defend the constitutionality of the legislative veto and were therefore proper parties to the case, *id.* at 930 n.5, but that case also involved Congress's role in making and enforcing federal law.[2]

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[2] In *Chadha*, the Court stated that "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is * * * unconstitutional." 462 U.S. at 940. In neither of the cases cited in *Chadha* immediately after that sentence, however, did Congress appear as a party. See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968) (*amicus curiae* defended judgment on statutory issue); *United States* v. *Lovett*, 328 U.S. 303, 304 (1946) (Congress appeared as *amicus curiae* to defend statute against various constitutional claims, including separation of powers claim). *Chadha* therefore cannot be taken to hold that Congress may always intervene to defend the constitutionality of a federal statute, or to appeal a judgment of unconstitutionality, whenever the Executive Branch declines to do so. Moreover, even if Congress does have the authority, as a matter of federal law, to intervene to defend the constitutionality of federal statutes and therefore has Article III standing in such cases, that does not mean that a state

The courts of appeals' legislative standing cases are to the same effect. In *Dennis* v. *Luis*, 741 F.2d 628 (1984), the Third Circuit ruled that members of the Virgin Islands Legislature had Article III standing to vindicate their advise-and-consent role in the appointment process against alleged encroachment by the Governor, but the court emphasized that the asserted right "has been vested only in members of the legislature." *Id.* at 631. In the D.C. Circuit's "pocket veto" cases, *Kennedy* v. *Sampson*, 511 F.2d 430 (1974), and *Barnes* v. *Kline*, 759 F.2d 21 (1984), vacated as moot, 479 U.S. 361 (1987), the court held that individual legislators had standing to challenge the President's exercise of a pocket veto as inconsistent with Article I, Section 7, of the Constitution, but the court stressed that the provisions at issue "define the prerogatives of each governmental branch in a manner which prevents overreaching by any one of them [and] allocate[] to the executive and legislative branches their respective roles in the lawmaking process." *Kennedy*, 511 F.2d at 434; accord *Barnes*, 759 F.2d at 26 (relying on *Kennedy* as law of the circuit). Therefore, although the courts have, in a handful of cases, ruled that legislators may sue to protect their distinct interest in the lawmaking process against alleged encroachment by another branch of the same governmental entity, they have not held that a state legislature may participate as a party to advocate the legal position of the State as a whole, when the legislature's interest in that position

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legislature also has Article III standing to defend the State's authority to regulate, in the absence of authorization under state law to represent the interest of the State as a whole.

is not different from the interest of the executive branch of the State.

This case is also distinguishable from cases such as *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972) (per curiam), in which the courts have permitted state legislators and legislative bodies to intervene in litigation over reapportionment plans. The Court noted in *Beens* that the State Senate would be "directly affected" by the district court's apportionment orders, since the composition of that body was at stake in the litigation. 406 U.S. at 194. In state apportionment cases, state legislators may have a distinct interest in the outcome of the legislation beyond their general interest in the validity of the apportionment law (which is shared by the State as a whole), since their tenure of office, indeed the existence of their positions, may be affected by the case. The Alaska Legislature has no such direct interest at stake in this case.

c. The Legislature lacks standing for the additional reason that the outcome of this litigation will not affect its authority to legislate—even if one assumes, *arguendo*, that such authority could provide it with a sufficient legally protected interest. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 561 (Article III standing requires that it be "likely" that an injury will be "redressed by a favorable decision"). Neither ANILCA nor this litigation has any effect on the Legislature's ability to perform its role in the state legislative process of considering and passing laws. Moreover, the authority of the State as a whole to regulate subsistence uses of fish and wildlife on "public lands" was curtailed by the enactment of ANILCA, which imposes, as a matter of federal law, substantive rules for preferences in the taking of fish

and wildlife. The Legislature has made no contention that ANILCA is unconstitutional. Therefore, the only pertinent question is *who* shall implement the preferences required by ANILCA—the federal departments or the executive agencies of the State of Alaska. When the laws passed by the Alaska Legislature were consistent with ANILCA, the State rather than the Secretary was responsible for implementing the subsistence right. But if the Legislature passes laws inconsistent with ANILCA, those laws could not be given effect because of the Supremacy Clause of the United States Constitution, irrespective of whether the Secretary of the Interior is authorized by ANILCA to fill the regulatory void. Accordingly, no injury to the Legislature's alleged independent interest in legislating for the public lands of Alaska could be redressed in this litigation if it were expanded to include the question of whether the Secretary may regulate when the State may not.

2. Petitioner AOC rests its claim of standing exclusively on the affidavits of members who speculate that future federal regulation could deprive them of subsistence resources on which they depend for food (94-1829 Pet. 11; 94-1829 Pet. App. 67a-69a). But, as we have noted (pp. 15-16, *supra*), the issue in this case on which AOC sought to intervene is the proper entity to implement the substantive requirements of ANILCA, and not the conformity of any particular regulation to those requirements. The AOC affidavits do not indicate how the interest of AOC's members in taking fish and wildlife would be affected by the fact that the Secretary, rather than the State, would implement ANILCA. AOC's claim to standing therefore fails because it has not shown a "causal connection between the injury and the conduct com-

plained of." *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 560.

AOC incorrectly contends (94-1829 Pet. 23) that the Ninth Circuit's denial of intervention without providing reasons conflicts with the Fourth Circuit's decision in *In re Sierra Club*, 945 F.2d 776, 780 (1991), where that court stated that the district court had abused its discretion by denying intervention without offering reasons. Although we agree that the better practice is for courts to provide reasons when denying intervention, *Sierra Club* did not announce an inflexible rule that such reasons must always be offered, even when it is clear that the parties seeking to intervene lack Article III standing. Furthermore, the principal justification for requiring a district court to provide reasons for denial of intervention (as in *Sierra Club*)—namely, to provide a record for review of the district court's action on the would-be intervenor's appeal of right (see *ibid.*)—does not apply to the same degree to the courts of appeals, which are called upon to allow intervention only in rare cases, as AOC recognizes (94-1829 Pet. 23). The Ninth Circuit's failure to explicate the reasons for its denial of intervention to AOC in this case therefore does not present an important issue warranting this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-1829 & 94-1976

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

LEGISLATURE OF THE STATE OF ALASKA,
Petitioner,

v.

STATE OF ALASKA,
Respondent,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITIONER'S REPLY BRIEF

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On Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

PETITIONER'S REPLY BRIEF

Petitioner, the State Legislature of Alaska, respectfully submits this reply brief in further support of its petition for writ of certiorari and in reply to the brief in opposition by the United States (hereinafter "the Government").

I. PETITIONER SEEKS TO INTERVENE IN THE COURT OF APPEALS ON BEHALF OF ITSELF IN ORDER TO PROTECT ITS OWN DISTINCT INTERESTS GRANTED TO IT BY LAW.

The Petitioner does not seek to intervene on behalf of the State as a whole, or on behalf of the citizens of Alaska. The Petitioner seeks to intervene on behalf of itself, in its capacity as a state legislature to protect its own distinct interest -- the ability to effectively legislate with regard to the management of fish and wildlife on public lands in Alaska -- a right granted to it specifically by the Alaska Constitution and the Alaska Statehood Act and Compact, both approved by Congress. Petition at 10-11, A 75, 80-83.

The Government attempts to confuse the issue before this Court by arguing that the Petitioner is seeking to intervene on behalf of the State of Alaska (as opposed to on behalf of itself -- the state legislature) and that, because of this fact, Petitioner has not demonstrated the requisite Article III interest for standing. Government Brief in Opposition at 12 (hereinafter Brief in Opposition). This argument is factually incorrect -- Petitioner does not seek to represent the State of Alaska, but instead to vindicate its right to legislate in this particular area.

The Government focuses on the Resolution (A 70), overwhelmingly passed in both Houses of Petitioner, in support of this argument. The Resolution *authorized* Petitioner's intervention -- it was not designed or intended to present the Article III legal basis for intervention. Moreover, the fact that the Petitioner is seeking to protect its interests as a state legislature (and not to act as representative of the state as a whole) is evident from all of the papers filed by Petitioner before the Ninth Circuit. *E.g.*, Emergency Motion for Leave to Intervene, at 2, 3, 6 (filed January 27, 1995) ("This motion to intervene . . . is being made because of the exceptional circumstances which have arisen and the unique rights of the State Legislature." "[The Legislature's]

ability to legislate and function in this area will be considerably curtailed if the challenged regulations are allowed to take effect." "The Legislature should be granted intervenor status in this appeal so that the Legislature's and State's interests[1] may be properly represented."); *See also* Memorandum in Support of Emergency Motion for Leave to Intervene, at 12-15 (filed February 1, 1995) ("The Legislature clearly has a unique interest which it seeks to vindicate in this appeal." "The Alaska Constitution specifically empowers the Legislature both to legislate and to regulate the use and allocation of Alaska's natural resources. . . .); *Id.* at 15 (". . . the Legislature has an interest in protecting its right to legislate in this important area."); *See also* Legislature's Letter Brief (filed February 7, 1995) at 3, 6 ("The Legislature is *in fact* restricted from legislating by the challenged regulations." ". . . the Legislature is intervening to protect an interest which it traditionally has standing to assert, namely, its ability to legislate.").

II. PETITIONER HAS DEMONSTRATED A LEGALLY PROTECTED INTEREST THEREBY SATISFYING THE REQUIREMENTS OF ARTICLE III STANDING.

Based on the Government's factually incorrect argument that Petitioner seeks to intervene on behalf of the State, the Government argues that Petitioner "has not satisfied one of the 'irreducible constitutional minimum' requirements of Article III, that it demonstrate injury to a 'legally protected interest.'"

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[1] The fact that intervention will enure to the benefit of the State and the people of Alaska as a whole (of course, it is in the interest of the State and the people of Alaska, that the powers granted to its state legislature by the Alaska Constitution and the Alaska Statehood Act and Compact not be usurped and denigrated or improperly preempted by the Secretary) does not detract from the immutable fact that the Petitioner seeks to intervene to protect its own unique interest -- the ability to effectively legislate in this important area.

Brief in Opposition at 10.[2] Petitioner did, however, demonstrate injury to a legally protected interest -- the ability to effectively legislate with regard to the management of fish and wildlife on public lands. Petition at 10-13.

The Government next argues that *Karcher v. May*, 484 U.S. 72 (1987) provides that a state legislature must have state law authorization in order to represent the state as a whole in litigation. Again, the Government makes this argument because it mistakenly believes that Petitioner seeks to intervene on behalf of the state as a whole. Brief in Opposition at 10-12.[3]

As a preliminary matter, the Government's interpretation of *Karcher* is incorrect. The issue in *Karcher*, was whether the Speaker of the New Jersey General Assembly and the President of the New Jersey Senate "sought and obtained permission to intervene as defendants *on behalf of the legislature*," not on behalf of the state. *Karcher*, 484 U.S. at 75 (emphasis added);[4]

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[2] The Government relies on *Mountain States Legal Foundation v. Costle*, 630 F.2d 754 (10th Cir. 1980), *cert. denied*, 450 U.S. 1050 (1981). Yet, in *Mountain States*, the state legislators sought to intervene *on behalf of the State of Colorado* as a whole and not on behalf of their own interests as state legislators or on behalf of the entire state legislature. *See* Petition at 17, n.28.

[3] Petitioner also established that it had state law authority to bring a lawsuit in its own name. Petition at 20-21. (And the Government points to no Alaska statute which prevents Petitioner from intervening in this lawsuit -- obviously, if there was one, it would have been cited.)

> If the decision of the court of appeals was based upon an interpretation of state law regarding the ability of Petitioner to bring a lawsuit on its own behalf, that question should have been certified to the Alaska Supreme Court pursuant to Alaska R. App. P. 407. *See Texas v. Pullman*, 312 U.S. 496 (1941); *Warwick v. State ex rel Chance*, 548 P.2d 384 (Alaska 1976); Petition at 21, n.34.

[4] The issue before this Court in *Karcher* was "whether public officials who have participated in a lawsuit solely in their official capacities may appeal an adverse judgment after they have left office." *Karcher*, 484 U.S. at 74.

Id. at 81 ("The New Jersey Supreme Court has granted applications of the Speaker of the General Assembly and the President of the Senate to intervene as parties-respondent *on behalf of the legislature* in defense of a legislative enactment.") (emphasis added).[5] Second, even if *Karcher* could be read to require state law authorization for a state legislature to represent the state as a whole, this is not what Petitioner seeks to do in this case. Finally, *Karcher* demonstrates that a state legislature has standing, separate from the State as a whole, to defend a legislative enactment. *See* Petition at 12.[6]

The Government concedes that a state legislature has standing to protect its own unique interests. Brief in Opposition at 12. ("The Legislature has standing only if it has some other, distinct interest (other than representing the State as a whole) that would be affected by the case"). Likewise, the Government concedes that the legislative standing cases cited in the Petition stand for the proposition that state and federal legislative bodies and individual legislatures have Article III standing to represent their own interests.[7]

As set forth fully in the petition for certiorari, Petitioner has demonstrated that it, as a state legislature, is seeking to intervene

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[5] Here, Petitioner was authorized to intervene on its own behalf.

[6] As Justice White pointed out in his concurrence, by allowing the legislature to intervene to defend the suit when the state executive did not wish to assert the statute's constitutionality, this Court "acknowledged that the New Jersey Legislature and its authorized representative have the authority to defend the constitutionality of a statute attacked in federal court." *Karcher*, 484 U.S. at 84-85. The case makes clear that a state legislature has a protected interest in defending its legislation as well as its ability to legislate.

[7] The Government attempts to distinguish those cases, however, on the ground that "in those cases . . . the legislators were not seeking to represent the interest of the State or of the United States as a whole, but were attempting to protect the legislature's separate interest in a specific role in the lawmaking or governing process . . ." Brief in Opposition at 12. Yet that is exactly Petitioner's position -- it is representing its own distinct interest.

in the court of appeals in order to protect its own unique interest, and not to represent the interest of the State as a whole. Petition at 9-13. This being the case, the Government's entire argument against Article III standing is misplaced.

III. THE OUTCOME OF THIS LITIGATION WILL EFFECT THE PETITIONER'S AUTHORITY TO LEGISLATE.

In addition, the Government's suggestion that the outcome of this litigation will not effect the Petitioner's ability to legislate on issues regarding the management of fish and wildlife is absurd.[8] The issue is not, as the Government suggests, whether the Petitioner will be able to legislate on *any* issue, but whether it will be able to *effectively* legislate on *this* issue. *E.g.*, *Coleman v. Miller*, 307 U.S. 433, 438 (1939); *Korioth v. Briscoe*, 523 F.2d 1271, 1277-78 (5th Cir. 1975). *See also* Petition at 10-13. The Petitioner has a right under the Alaska Statehood Act and Compact and the Alaska Constitution, both federally ratified, to effectively legislate on this issue and to have is votes given effect. Petition at 10-11. The Secretary's action is clearly an abridgment of that right.

IV. THE GOVERNMENT'S DISCUSSION OF THE UNDERLYING SUBSTANTIVE MERITS OF THIS CASE IS PREMATURE AND IS RELEVANT ONLY TO THE IMPORTANCE OF INTERVENTION.

Next, the Government provides a brief and convoluted argument on the underlying substantive merits (suggesting that ANILCA's federal preemption of Petitioner's authority is valid pursuant to the Supremacy Clause and that therefore the Petitioner has no interests to protect) and suggests that Petitioner did not argue in its petition that "ANILCA is unconstitutional" --

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[8] Brief in Opposition at 15 ("Neither ANILCA nor this litigation has any effect on the Legislature's ability to perform its role in the state legislative process of considering and passing laws.").

implying that this would have been a fatal error. Brief in Opposition at 16.

First, Petitioner did discuss the constitutional implications of the underlying substantive merits -- an improper exercise of preemption pursuant to the Supremacy Clause -- in the section of the petition for certiorari on the exceptional importance of intervention. *See* Petition at 21-25. Second, the Government's discussion of the underlying substantive merits of this case is untimely and irrelevant (other than as to the importance of the issues Petitioner seeks to present by this intervention) -- to whether Petitioner had Article III standing to intervene before the court of appeals.

V. THE COURT OF APPEAL'S DENIAL OF INTERVENTION IN THIS CASE HAS PRECEDENTIAL VALUE.

There is precedential value with regard to the denial of intervention. Although the motion to intervene denied by the court of appeals took the form of an unpublished order, the decision on the continued appeal reported the denial of the motion to intervene and the basis for such denial -- in a *published* opinion:

> The Alaska Legislature, angry with the Governor's directive to the Attorney General to stipulate to the dismissal, filed an emergency motion for intervention and, in the alternative, for substitution, or for stay. *We denied its motion, concluding that the Legislature was not empowered under state law to intervene in the appeal. In light of the dismissal with prejudice of that issue, the district court's holding on this issue stands.*

State of Alaska v. Babbitt, 54 F.3d 549, 550 n.2 (9th Cir. 1995) (emphasis added) A-55-56.

Moreover, the district court opinion on the authority issue, as well as the published Ninth Circuit decision on the merits on

the other issues (which presumes the authority of the Secretary to establish the Federal Subsistence Board, promulgate regulations thereunder and to manage fish and wildlife)[9] will carry the precedential weight of *stare decisis*. Petition at 15-16.

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[9] Since the filing of the petition for certiorari, the Alaska Supreme Court has held that notwithstanding the Ninth Circuit and federal district court opinions, ANILCA does not preempt state regulation of hunting and fishing for subsistence purposes on public lands.

> We are not obliged to follow [the Ninth Circuit holding] since this court is not bound by decisions of federal courts other than the Supreme Court. . . .
>
> For a number of reasons . . . the federal government has no authority to regulate hunting and fishing in Alaska's navigable waters.

Totemoff v. State of Alaska, 1995 Alas. LEXIS 85 at 23-24 (Alaska Supreme Court, 1995).

This opinion serves to further emphasize the state/federal disparity which exists and the urgent need to have this issue resolved. *See* Petition at 26.

VI. CONCLUSION

The denial by the court of appeals of the Petitioner's intervention and the entry of the dismissal challenging the Secretary's authority should be reversed and the matter remanded with instructions to permit Petitioner's intervention and full participation in this case. Alternatively, the petition for a writ of certiorari should be granted on the intervention issue.

Respectfully submitted,

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